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ADDRESSING VAGUENESS, AMBIGUITY, AND OTHER UNCERTAINTY IN AMERICAN CRIMINAL LAWS

JOHN F. DECKER[†]

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INTRODUCTION

As a student, professor, and practitioner of criminal law for more decades than I care to admit, I have encountered a myriad of concepts, principles, rules, and abstractions, many of which are reasonably comprehensible and some of which make damn little sense. In some cases, such as in connection with my authorship of the "definitive" (or so my publishing company claims) work on Illinois criminal law, my goal is to sort out and explain the "elements" of criminal law theories of culpability (e.g., accountability principles), offenses (e.g., murder), and defenses (e.g., self defense). In the classroom, I face the constant challenge of developing the students' analytical minds by confronting them with critical queries about this or that case, hypothetical situation, principle, or law and, at other times, developing formulas for their benefit designed to simplify a bundle of confusing applications of law to facts (e.g., criminal attempt = a defendant's "substantial step" towards criminality + defendant's "specific intent" to achieve a criminal goal; constitutional death penalty = a defendant's commission of murder (not rape, etc.) + elements of aggravation (e.g., killed a cop) + consideration of *any* (not just some) mitigating circumstances). In the continuing legal education programs with which I am regularly involved, I strive to prepare a captivating lecture, a useful outline, or well researched written materials that will neither confuse nor bore the attendee. In the courtroom, I am to present the brief, the case precedent, or the argument that wins-over her honor. In each of these situations, the challenge is to analyze, synthesize, explain, reason, rationalize, and/or distinguish a legal concept. After examination and reexamination over the years, I believe (perhaps naively) that I understand quite well most criminal justice concepts, including the more complex that may confuse even the criminal court judges I lecture (e.g., Fourth Amendment). Others (e.g., what really separates the "legally" insane from those who are not) I never will.

In my opinion, one of the subjects that defies principled reasoning is the concept of *vagueness* in the criminal law. Past explaining the basics—criminal laws must give "fair notice"[1] and contain an "ascertainable standard of guilt"[2] that guide the arm of enforcement—most treatments of the subject, whether in treatises, commentary, or judicial opinion, provide the reader with no semblance of criteria, guidelines, or standards that might assist even the trained eye with the ability to predict

1. *See* Colautti v. Franklin, 439 U.S. 379, 390 (1979).
2. *See* Palmer v. City of Euclid, 402 U.S. 544, 545 (1971) (per curiam).

whether a given stricture challenged on vagueness grounds will survive constitutional attack. And, quite frankly, this is true because there exists no criteria, guidelines, or standards that provide a meaningful measuring stick for making such prediction. Vagueness analyses seem to me to be devoid of objective tests. Vagueness is a concept that appears heavily dependent on the "I know it when I see it"[3] test, where one begins with a conclusion and thereafter works backward for rational support. Vagueness challenges require a highly subjective mode of analysis that involves an unpredictable assortment of paths a court might take in arriving at a ruling.

Less confusing is another concern that can plague criminal legislation, namely, *ambiguity*. A relative of vagueness, ambiguity appears where otherwise understandable legislation lends itself to two or more *equally* plausible interpretations. When faced with ambiguity, the reviewing court will usually (although not necessarily) plug in a doctrine that gives the accused the advantage. In other words, whatever interpretation is most beneficial to the accused is the one that wins out. Having said that, however, does not mean that identifying an uncertainty in legislation as an ambiguity, as opposed to a problem of vagueness, is necessarily a simple task. For example, at what point is it permissible to conclude the legislation contains *sufficient specificity* that it can be described as ambiguous rather than vague? Or, at what point can there be agreement that the law in question lends itself to two *equally* possible interpretations?

Beyond vagueness and ambiguity, there exists what this article will simply call *uncertainty* in legislation. Here, a court is not entertaining a vagueness challenge nor convinced the legislation under consideration is ambiguous, because the law, at first blush, appears to carry one meaning that is more likely than any other. Instead, the court in its analysis of the somewhat uncertain law will struggle to clarify for the benefit of both the citizenry and law enforcement the actual scope of the law in question.

The purpose, then, of this article is not to offer a useful measuring stick for predicting the outcome of a vagueness claim in criminal law, but rather a description of the vehicles used by courts to *justify* their conclusions as to whether a defendant had "fair notice,"[4] or police, prosecutors, and juries had an "ascertainable standard of guilt"[5] that might avoid arbitrary and discriminatory enforcement. Similarly, it will attempt to identify, beyond simply referring to certain doctrinal rhetoric, how a court goes about addressing ambiguities. Finally, legislation not challenged on vagueness grounds nor considered ambiguous may neverthe-

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3. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
4. *See Colautti*, 439 U.S. at 390.
5. *See Palmer*, 402 U.S. at 545.

less contain uncertain language that will require a court to seek out its true meaning. Again, this article will undertake an examination of a court's methods in such cases.

Part I examines the basics—the principle of legality and its corollary concerns of fair notice and avoidance of arbitrary or discriminatory enforcement. Part II examines the concept of ambiguity. Part III addresses the dichotomy between overbreadth and vagueness concerns that have often been confused in court opinions. Parts IV, V, and VI are designed to examine the concerns that may explain the ultimate conclusion that arises out of a vagueness dispute. Specifically, Part IV points out that a legislature's statutory inclusion of (1) a detailed listing of items or activities which a particular criminal measure seeks to restrict and (2) an element of *mens rea* in a criminal enactment, while certainly not outcome dispositive, may offer the court a basis for concluding the offense in question offered the necessary notice. Part V offers a number of possible *sources* of information that may provide instruction as to the meaning of language in a criminal proscription. Alternatively, examination of such sources may reveal a complete lack of consensus as to how certain words might be interpreted, thereby reinforcing a complainant's assertion that a particular criminal law failed to offer any direction to the citizenry as to the scope of questionable enactments or terminology within. Here, it will be pointed out that consultation of common dictionaries, for example, might provide a court with an "answer" as to whether the meaning of a law is clear or nebulous. Part VI offers a few rules of thumb that courts may employ to rationalize their position. For instance, it is obvious the courts will demand more specificity or precision of language if the law in question might implicate constitutional terrain than will be expected if it does not. Hopefully, this journey through the case law will contribute to a better understanding of these subjects, quite appropriately, called vagueness, ambiguity, and uncertainty.

I. THE PRINCIPLE OF LEGALITY

The most fundamental tenet of criminal law is the *principal of legality*,[6] which today means that criminal liability and punishment can only be predicated on a prior legislative enactment that states what is proscribed as an offense in a precise and clear manner.[7] This is a concept that is reliant on various doctrines, most significantly the "void for vagueness" doctrine and the doctrine of "strict construction."[8] The

6. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79-80 (1968).

7. PAUL H. ROBINSON, CRIMINAL LAW § 2.2, at 74-75 (1997).

8. PACKER, *supra* note 6, at 93. Two classic treatments of these subjects are Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960), and John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

vagueness doctrine is directed toward providing an adequate definition of *what* behavior is criminal and to *whom* it applies.[9] The doctrine of strict construction of penal statutes, which has been described as the "junior version of the vagueness doctrine,"[10] requires resolution of differing interpretations of language in a criminal statute to the advantage of the accused.[11] If a criminal stricture is sufficiently nebulous that it fails to define that which is supposed to be illegal, then it suffers from the perils of *vagueness*.[12] If vague, it is *void*; it is unsalvageable. In contrast, if the criminal measure, cast in relatively clear language, lends itself to two or more *equally* plausible interpretations, then the enactment is merely *ambiguous*.[13] In this latter case, in steps the doctrine of strict construction. This doctrine, also called the rule of lenity, which serves as a "tie-breaker," insists the ambiguity be resolved against the government and to the advantage of the accused.[14] Thus, as a general matter, if the statute is deemed vague, the court has been unable to decipher where the legislature drew the line between illicit and licit behavior. It has thrown in the towel. Alternatively, if the statute is found to be ambiguous, the court is bent on making the determination as to where the legislature drew the line and, to that end, plugs in the rule of lenity to bring about resolution.

The Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution, which guarantee that "no person shall . . . be deprived of life, liberty, or property, without due process of law,"[15] have been construed as requiring that citizens have notice of what behavior is or is not illegal.[16] To preserve this guarantee, the courts have adopted the "void-for-vagueness doctrine."[17] This doctrine requires that:

> the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[18]

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9. PACKER, *supra* note 6, at 93-94.

10. *Id.* at 95.

11. ROBINSON, *supra* note 7, at 76 (citing Rewis v. United States, 401 U.S. 808 (1971)).

12. *Id.*

13. *Id.*

14. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 5.04, at 47 (3d ed. 2001).

15. U.S. CONST. amend. V; *see* U.S. CONST. amend XIV.

16. *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.").

17. Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citing Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)).

18. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (citing Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 221-22 (1914)); *see also* Collins v. Kentucky, 234 U.S. 634, 638 (1914)

The void-for-vagueness doctrine also requires that penal statutes be defined in a manner that does not encourage "arbitrary and discriminatory enforcement" bylaw enforcement authorities.[19]

In *Grayned v. City of Rockford*,[20] the United States Supreme Court articulated the critical policy considerations that are at the heart of the due process mandate requiring avoidance of statutory vagueness:

> Vague laws offend several important values. First, because [this Court] assume[s] that man is free to steer between lawful and unlawful conduct, [this Court] insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.[21]

Consequently, when a claim of unconstitutional vagueness is raised in a court of law, there are two basic questions to be asked when determining whether a statute is void because of its vagueness:

(1) Does this statute provide fair notice or warning to the citizens as far as what is and is not prohibited or required by the statute?[22]

(2) Does this statute provide an ascertainable standard of guilt so that it does not encourage arbitrary and discriminatory enforcement?[23]

If the answer to both of these questions is in the affirmative, then the statute will be upheld against a void-for-vagueness challenge.[24] How-

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(stating that the statute in *Int'l Harvester* presented no standard of conduct that was possible to know).

19. *Kolender*, 461 U.S. at 357.

20. 408 U.S. 104 (1972).

21. *Grayned*, 408 U.S. at 108-09.

22. *See, e.g.*, Kramer v. Price, 712 F.2d 174, 176 (5th Cir. 1983) ("Vague statutes fail to provide citizens with fair notice or warning of statutory prohibitions so that they may act in a lawful manner." (citing *Connally*, 269 U.S. at 391)), *aff'd on other grounds on reh'g*, 723 F.2d 1164 (5th Cir. 1984).

23. *See, e.g.*, *Kolender*, 461 U.S. at 358 ("Where the legislature fails to provide certain minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" (alteration in original) (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974))).

24. *See, e.g.*, United States v. Powell, 423 U.S. 87, 92-93 (1975) (upholding a statute prohibiting mailing pistols and "other firearms capable of being concealed on the person" because it established a "reasonably ascertainable standard of conduct" and because it provided notice to the citizens as to what actions are proscribed by the statute).

ever, if a statute fails either part of the test, the statute is void because of its vagueness.[25]

It is important to understand from the outset that the pursuit of a void-for-vagueness finding is an uphill battle. An elementary, but critical, point in this type of challenge is that courts begin their analysis with the *presumption* that the statute under attack is valid.[26] Also, a court, *if* in fairness such is possible, must give a statute a *reasonable* construction or interpretation to avoid unconstitutional indefiniteness.[27]

A second fundamental point regarding any vagueness challenge is that a reviewing court is not restricted to an examination of the legislation on its face; rather, whether the statute provides fair notice and an ascertainable standard of guilt turns on *prior* judicial construction or interpretation.[28] An authoritative construction of a statute by a jurisdiction's highest court will be considered as interpretative of the "words in the statute as definitely as if it had been so amended by the legislature."[29] Thus, in some cases, a narrowing construction may save the enactment from a successful attack.[30] However, in other cases, a judicial "gloss" may narrow the scope of the act, but not enough to save it.[31] In yet other cases, what may appear is an unforeseeable and retroactive judicial expansion of narrow and precise statutory language that can only aggravate the integrity of the law.[32]

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25. *See, e.g.*, Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927) (finding that the Colorado Anti-trust Act is void because it fails to provide an ascertainable standard of guilt); *see also* People v. Monroe, 515 N.E.2d 42, 45 (Ill. 1987) (finding an Illinois drug paraphernalia prohibition void because it failed to afford fair notice of what conduct was prohibited and also lent itself to arbitrary enforcement).

26. *See, e.g.*, United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32 (1963) (finding that federal Robinson-Patman Act making it a crime to sell goods at "unreasonably low prices" in order to destroy competitors not vague and that a "strong presumptive validity . . . attaches to an Act of Congress").

27. United States v. Harriss, 347 U.S. 612, 618 n.6 (1954) (citing United States v. Del. & Hudson Co., 213 U.S. 366, 407-08 (1909), and finding the Federal Regulation of Lobbying Act not vague).

28. Wainwright v. Stone, 414 U.S. 21, 22 (1973) (noting that, in reviewing a claim of vagueness of a state statute, the United States Supreme Court must take the statute as though it read precisely as the highest court of the state has interpreted it).

29. Winters v. New York, 333 U.S. 507, 514 (1948).

30. *See, e.g.*, Watts v. United States, 394 U.S. 705, 707-08 (1969) (finding that the prohibition outlawing threats to the President of the United States requires proof of a "true threat" to the President's life or limb and, thus, the statute as construed is "certainly" not void on its face).

31. *See, e.g.*, *Winters*, 333 U.S. at 518-19 (holding that the state statute outlawing "obscene prints and articles" was not saved by New York Court of Appeals determination that statute only reached materials "so massed as to become vehicles for inciting violent and depraved crimes").

32. *See, e.g.*, Bouie v. Columbia, 378 U.S. 347, 352 (1964) (finding that the South Carolina Supreme Court violated the defendant's due process rights in applying its 1961 construction of state statute prohibiting *entry* of lands of another after notice not to enter as prohibiting the act of *remaining* on premises after being asked to leave, to affirm the conviction of the defendant, who in 1960 refused to leave luncheonette department of drug store after requested to leave).

A. *The "Fair Notice"*[33] *Requirement*

Providing adequate notice does not require that a defendant actually know that his conduct constitutes a violation of the law.[34] An *actual* notice requirement would run afoul of the principle that ignorance of the law is no excuse. Thus, as a practical matter, the requirement of "fair notice"[35] merely insists (although no court will admit it) that a defendant have *constructive* notice that his act is criminal; that is, that the defendant *could* have found out whether his conduct was prohibited by the statute.[36] A statute is void for vagueness if it fails to draw reasonably clear lines between lawful and unlawful conduct such that the defendant has no way to find out whether his conduct is controlled by the statute.[37] Vague statutes are constitutionally unacceptable because they fail to provide citizens with fair notice or warning of statutory prohibitions so that they may act in a lawful manner.[38]

On various occasions, the United States Supreme Court has struck down federal and state criminal statutes under the Due Process Clause for not being sufficiently explicit in informing those who were subject to the laws what conduct on their part would render them liable to criminal penalties.[39] In this connection, it has been pointed out that there are no mechanical standards to be rigidly applied to every case; rather, the degree of vagueness that may be tolerated depends on "the nature of the

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33. *See* Colautti v. Franklin, 439 U.S. 379, 390 (1979).

34. *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW § 5.1(d), at 441 (3d ed. 2000) (noting the fact that ignorance of the criminal law is not a defense is based upon the early notion that the law was "definite and knowable" and that everyone is presumed to know the law that is, of course, an "obvious fiction").

35. *Colautti*, 439 U.S. at 390 (finding stricture outlawing abortion of "viable" fetus vague for failing to provide "fair notice" regarding test for viability).

36. *Cf.* Rose v. Locke, 423 U.S. 48, 50, 53 (1975) ("Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid."); *see also Connally*, 269 U.S. at 393 ("The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue."); Columbia Natural Res., Inc., v. Tatum, 58 F.3d 1101, 1105 (6th Cir. 1995) (stating that the United States Supreme Court case law on vagueness "reflects the common sense understanding that the average citizen does not read, at his leisure, every federal, state, and local statute to which he is subject"), *cert. denied*, 516 U.S. 1158 (1996); Jeffries, *supra* note 8, at 207 ("[T]he kind of notice required is entirely formal. Publication of a statute's text always suffices; the government need made no further effort to apprise the people of the content of the law . . . . In short, the fair warning requirement of the vagueness doctrine is not structured to achieve actual notice of the content of the penal law.").

37. *See* Smith v. Goguen, 415 U.S. 566, 574 (finding that the Massachusetts flag misuse statute outlawing "contemptuous treatment of flag" was vague because the statute failed to delineate the kinds non-ceremonial treatment that is criminal and that which is not).

38. *See Connally*, 269 U.S. at 388 (finding that the Oklahoma statute requiring employees to be paid "not less than the current rate per diem wages in the locality" was vague).

39. *See* Bouie v. Columbia, 378 U.S. 347, 350-51 (1964) (discussing prior opinions where the Court employed the void-for-vagueness doctrine).

enactment."[40] First, the Court has suggested that the need for notice is greater when the statute imposes penalties on individual behavior than when it regulates the economic behavior of businesses inasmuch as the "subject matter" under regulation "is often more narrow . . . because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action," and because these entities "may have the ability to clarify the meaning of the regulation by [their] own inquiry, or by resort to an administrative process."[41] Second, greater latitude is given when the enactment is civil rather than criminal because "the consequences of imprecision are qualitatively less severe" given their differing penalty structures.[42] Third, statutes which involve a *scienter* requirement are more likely to withstand a claim of vagueness where they ensure that the law punishes only those who are aware that their conduct is unlawful.[43] Fourth, in cases where the statute under consideration may affect constitutionally protected conduct, particularly First Amendment speech, the reviewing court is less likely to find that constructive notice exists than in cases where the statute could not possibly infringe upon such constitutional freedoms.[44] A study of the case law in this area prompted one commentator to observe that *as a practical matter*, the courts actually measure vagueness claims by consideration of: (1) the significance of the legislative enactment, i.e., its importance in the larger social scheme;[45] (2) the necessity of the statutory ambiguity in achieving the underlying goal;[46] and (3) the impact of the legislation "on protected or desirable conduct."[47] Moreover, judges

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40. *See Vill. of Hoffman Estates*, 455 U.S. at 498.

41. *Id.* at 498.

42. *Id.* at 498-99.

43. *Id.* at 499. A requirement of specific intent that is interpreted as the intentional commission of an act which is (or just happens to be) criminal obviously does *not* give rise to a presumption of fair notice in the same way as where the specific intent is interpreted as the willful commission of an act *knowing the act to be wrong*. Screws v. United States, 325 U.S. 91, 101-02 (1945) (plurality opinion); *see also Colautti*, 439 U.S. at 394-95 (finding lack of criminal *mens rea* aggravated ambiguity in Pennsylvania Abortion Control Act); *Goguen*, 415 U.S. at 579-80 (finding Massachusetts flag misuse prohibition that outlawed treating the flag in a "contemptuous" manner did not clarify whether contempt had to be intentional or could be inadvertent and, as such, statute was vague).

44. *Vill. of Hoffman Estates*, 455 U.S. at 498-99. These decisions may be based on the assertion the statute is violative of due process. *E.g.*, *Goguen*, 415 U.S. at 566 (finding Massachusetts flag misuse prohibition that outlaws "contemptuous treatment" of the flag is void for vagueness in violation of due process). Other decisions are claimed to be a violation of the First Amendment. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 432-33 (1963) (finding Virginia prohibition against solicitation of legal business which made it a crime for a person to advise another that his legal rights may have been infringed and to refer him to a particular attorney or group of attorneys was vague and in violation of the First Amendment).

45. *See* Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 10 (1997).

46. *See* Batey, *supra* note 45, at 2.

47. *Id.* at 2; *see also* Jeffries, *supra* note 8, at 215-16 (pointing out that the vagueness doctrine "is so often invoked against street cleaning statutes—local ordinances directed against some form of

"veil" these analytical considerations lest they appear less like judges and more like legislators.[48]

For example, in *Johnson v. Athens-Clarke County*,[49] the Georgia Supreme Court considered the constitutionality of a local anti-loitering statute. In that case, the defendant was arrested after being observed on the same street corner on which police had observed him four times over the two days prior to his arrest, and on all four previous occasions the defendant was told by the police to move along.[50] The defendant was prosecuted under a county municipal ordinance outlawing "loitering or prowling."[51]

Although in previous cases the Georgia Supreme Court had upheld the State's loitering statute against vagueness challenges,[52] the court was troubled with this particular municipal loitering ordinance because of the final clause of the ordinance, which proscribed as illegal a person's presence "under circumstances which cause a justifiable and reasonable alarm or immediate concern that such person is involved in unlawful drug activity."[53] The court noted that:

> an innocent person unfamiliar with the drug culture could stand or sit in a 'known drug area' without knowing the area had such a designation, and could return to the area for a legitimate reason, or for no reason at all, and, as the facts of this case show, be subject to arrest and conviction.[54]

The court found no language in the ordinance that would put an innocent person, such as the defendant, on notice that his behavior was forbidden.[55] The court distinguished this ordinance from the ordinance that it had previously reviewed in *Bell v. State*.[56] In *Bell*, the Georgia Supreme Court had upheld a State anti-loitering statute that prohibited conduct that created a "reasonable alarm or immediate concern for the safety of

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public nuisance, typically involving trivial misconduct, usually with no specifically identifiable victim, and carrying minor penalties").

48. *See* Batey, *supra* note 45, at 2.

49. 529 S.E.2d 613 (Ga. 2000).

50. *Johnson*, 529 S.E.2d at 614.

51. *Id.* ("A person commits the offense of loitering or prowling when he is in a place at a time or in a manner not usual for law-abiding individuals under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity or under circumstances which cause a justifiable and reasonable alarm or immediate concern that such person is involved in unlawful drug activity." (quoting ATHENS-CLARKE COUNTY MUN. ORDINANCE § 3-5-23 (1993))).

52. *See* State v. Burch, 443 S.E.2d 483 (Ga. 1994); Bell v. State, 313 S.E.2d 678 (Ga. 1984).

53. *Johnson*, 529 S.E.2d at 615.

54. *Id.* at 616.

55. *Id.*

56. 313 S.E.2d 678 (Ga. 1984).

persons or property in the vicinity."[57] While the court in *Bell* had determined that a person of average intelligence could understand what conduct created a "reasonable alarm or immediate concern of the safety for persons or property in the vicinity," the court in *Johnson* concluded that a person of average intelligence could not necessarily understand what activity would "cause a justifiable and reasonable alarm or immediate concern that such person is involved in unlawful drug activity."[58]

The court examined the criteria that were used by the arresting officer in the present case to determine whether the defendant was in violation of the statute.[59] Here, the officer had arrested the defendant because the area that he was in was a known drug area and the defendant's conduct in returning to the same spot repeatedly was characteristic of drug related activities.[60] The court pointed out that the determination of whether or not the defendant was in violation of the statute was based on the officer's law enforcement experience in that area, not on general knowledge and common experience of a person of ordinary intelligence.[61] The court held that because the statute failed to provide fair warning to persons of ordinary intelligence as to what the language at issue that was contained in the ordinance actually prohibited, the statute was "void for vagueness."[62] Here, then, the court seemed to hang its hat on the concern over application of the statute to wholly innocent conduct. In addition, the statute was directed at the behavior of an individual, rather than a business, and was criminal, rather than civil, which made the nebulous language more problematic. Although not mentioned by the court, government proof of *scienter* was not required. Finally, loitering constitutes no significant threat to life, limb, or property.

Of course, the United States Supreme Court has had occasion to review a statute and conclude it failed to provide fair notice as to what was proscribed. An oft-cited case in this area is *Winters v. New York*,[63] where a defendant was convicted of a misdemeanor offense of possessing with intent to sell certain magazines "devoted . . . principally . . . [to] criminal news, police reports, and accounts of criminal deeds, and pictures and stories of deeds of bloodshed, lust and crime" contrary to the New York Penal Code.[64] On appeal, the New York Court of Appeals interpreted this statute to apply to only those "collections of criminal deeds of bloodshed or lust [which] 'can be so massed as to become vehicles for inciting violent and depraved crimes against the person'" and

57. *Johnson*, 529 S.E.2d at 616 (referring to GA. CODE ANN. § 16-11-36 (Michie 1999)).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 617.
63. 333 U.S. 507 (1948).
64. *Winters*, 333 U.S. at 508 (quoting N.Y. PENAL LAW, ch. 39 § 1141(2) (McKinney 1944)).

upheld the defendant's conviction.[65] However, the United States Supreme Court reversed.[66] The Court first noted basic First Amendment protections of free speech and press were implicated by this stricture.[67] "[E]ven considering the gloss" the New York Court of Appeals had put on this statute in order to narrow its scope to not include "detective tales and treatises on criminology," for example, it remained highly uncertain as to what type of materials might still "be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications."[68] Also, no criminal intent or purpose was required in order to convict an alleged offender.[69] Moreover, this measure reflected "no indecency or obscenity in any sense heretofore known to the law."[70] It carried "no technical or common law meaning."[71] In addition, the statute had the capacity to reach, for example, "[c]ollections of tales of war horrors" and criminalize other "innocent" activity.[72] The statute set neither guidelines for the distributor of questionable materials nor a useful measuring stick for courts or juries.[73] Because the "standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement," this proscription that was devoid of "fair notice" was contrary to due process of law and thus void-for-vagueness.[74]

Winters, like the Georgia Supreme Court's decision in *Johnson*, reflects the type of measure that is most vulnerable to a vagueness attack.[75] Innocent, as well as constitutionally protected, behavior was implicated.[76] Proof of *scienter* was lacking.[77] The penalty was criminal, not civil.[78] The defendant was an individual, not a collective entity.[79] Finally, no demonstrable threat to person or property was involved.[80]

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65. *Id.* at 512-13 (quoting People v. Winters, 63 N.E.2d 98, 100 (N.Y. 1945)).
66. *Id.* at 520.
67. *Id.* at 518-19.
68. *Id.*
69. *Id.* at 519.
70. *Id.*
71. *Id.*
72. *Id.* at 520.
73. *Id.* at 519-20.
74. *Id.* at 509-10, 515.
75. *Id.* at 509-10; *Johnson*, 529 S.E.2d at 615.
76. *Johnson*, 529 S.E.2d at 616.
77. *Winters*, 333 U.S. at 509-10.
78. *Id.*
79. *Id.*
80. *Id.*

B. The "Ascertainable Standard of Guilt"[81] Requirement

Although an analysis of a vagueness claim focuses both on the adequacy of the notice to citizens and concern over arbitrary enforcement, the United States Supreme Court has recognized that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement."[82] "The absence of a determinate standard" in a given legal proscription "gives police officers, prosecutors, and the triers of fact unfettered discretion to apply the law and, thus there is a danger of arbitrary and discriminatory enforcement" of such a law.[83] Consequently, the void-for-vagueness doctrine demands that these measures provide "officials with explicit guidelines in order to avoid [such] arbitrary and discriminatory enforcement."[84] They must reflect what the Court has described as an "ascertainable standard[] of guilt."[85] The Court has long recognized that "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."[86] To that end, laws are invalidated if they are "wholly lacking in 'terms susceptible of objective measurement.'"[87] It has been observed that "[l]aws that have failed to meet this [vagueness] standard are, almost without exception, those which turn on language calling for the exercise of subjective judgment [of the enforcer] unaided by objective norms."[88]

Beyond concerns relating to providing guidance to police, "[I]t is established that a law [also] fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves . . . *judges* and *jurors* free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."[89] An act's criminality cannot depend upon, as a general rule, whether a jury may think one's

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81. *See Palmer*, 402 U.S. at 545.

82. *Kolender*, 461 U.S. at 358 (quoting *Goguen*, 415 U.S. at 574).

83. *Kramer*, 712 F.2d at 176 (holding that a Texas harassment statute outlawing communications which "annoy" or "alarm" another is vague).

84. Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (finding that the definition of "educational" contained in a federal treasury regulation governing tax exemptions for charitable and educational organization was vague).

85. *Palmer*, 402 U.S. at 545 (holding municipal "suspicious persons" ordinance vague); *Winters*, 333 U.S. at 515 (holding state Obscene and Prints Article Act vague); Cline v. Frink Dairy Co., 274 U.S. 445, 459-60 (1927) (holding Colorado Anti-Trust Act vague).

86. United States v. Reese, 92 U.S. 214, 221 (1875).

87. Keyishian v. Bd. of Regents, 385 U.S. 589, 604 (1967) (quoting Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 286 (1961)).

88. *NAACP*, 371 U.S. at 466 (Harlan, J., dissenting).

89. Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966) (emphasis added).

conduct is unreasonable, improper, or immoral.[90] Rather, there must be some definiteness and certainty written into the law.[91] The Court has made clear that "[t]he dividing line between what is lawful and unlawful cannot be left to conjecture."[92] "The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions" by the fact finder.[93] When a law fails to provide an ascertainable standard of guilt, "[i]t leaves open . . . the widest conceivable inquiry, the scope of which no one can . . . foreshadow or adequately guard against."[94]

One example of a statute being struck down for vagueness because of its potential for arbitrary enforcement appeared in *Papachristou v. City of Jacksonville*.[95] In this consolidated case, nine defendants were arrested for violating Jacksonville's vagrancy ordinance.[96] The first four defendants, Papachristou, Calloway, Melton, and Johnson[97] were riding in Calloway's car on a main thoroughfare in Jacksonville, Florida, on the way to a nightclub.[98] They were arrested because "the defendants had stopped near a used-car lot that had been broken into several times."[99] These four individuals were charged with "prowling by auto."[100]

Two other defendants, Smith and Henry, were waiting for a friend in downtown Jacksonville.[101] It was a cold day and Smith did not have a jacket.[102] The two entered a dry cleaning shop to continue their wait but

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90. Nash v. United States, 229 U.S. 373, 377 (1913) (citing Tozer v. United States, 52 F. 917, 919 (C.C.E.D. Mo. 1892)).

91. *Nash*, 229 U.S. at 377.

92. *Connally*, 269 U.S. at 393.

93. *Id.*

94. United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921).

95. 405 U.S. 156, 171 (1972).

96. *Papachristou*, 405 U.S. at 156. The Florida ordinance provided in part:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, person who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, person wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places were alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

JACKSONVILLE, FLA., CODE § 26-57.

97. Papachristou and Calloway were white females; Melton and Johnson were black males. *Papachristou*, 405 U.S. at 158.

98. *Id.* at 158-59.

99. *Id.* at 159. The Court pointed out that there was no evidence of any breaking or entering into the used car lot during the night in question. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

were asked to leave.[103] After they left, they walked up and down a two block area two or three times, whereupon the observing storeowners contacted the police.[104] The police officers arrested Smith and Henry because they did not have any identification and because the police officers did not believe the defendants' story.[105]

The seventh defendant, Heath, was arrested after he and his companion drove down his girlfriend's driveway, where they noticed police officers arresting a third party, whereupon the two proceeded to back out.[106] At this point, police arrested Heath and his companions. Heath was charged with being a "common thief" because he had a reputation of being a thief.[107] Heath's companion was arrested for "loitering" in the driveway.[108]

The eighth defendant, Campbell was arrested when he arrived home in the very early morning hours.[109] Police officers stopped him for speeding, but no speeding charge was ever issued against him.[110]

The ninth defendant, Brown, was arrested when police officers called him over to their car.[111] The police officers began to search him and, when Brown started to resist, the officers discovered two packets of heroin in his pocket.[112] However, Brown was charged with "disorderly loitering on the street, and disorderly conduct – resisting arrest with violence."[113]

In reviewing the charges, the United States Supreme Court stated that the activities codified in the Jacksonville ordinance involved "normally innocent" behavior.[114] These activities included "night walking," "loafing," "wandering or strolling," and "habitually . . . frequenting . . . places where alcoholic beverages are sold or served."[115] The Court used the writings of Walt Whitman, Vachel Lindsay, and Henry David Thoreau to illustrate:

> The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have

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103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 160.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 160-61.
114. *Id.* at 163.
115. *Id.* at 163-64.

> been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity.
>
> . . . They are embedded in Walt Whitman's writings, especially in his 'Song of the Open Road.' They are reflected too, in the spirit of Vachel Lindsay's 'I Want to Go Wandering,' and by Henry D. Thoreau.[116]

The Court determined that the Jacksonville ordinance cast a net too large such that the crimes it defined were "so all-inclusive and generalized . . . [that] those convicted may be punished for no more than vindicating affronts to police authority."[117] Additionally, law enforcement had "unfettered discretion" in determining when an individual was violating the ordinance.[118] The Court concluded that the statutory "scheme permits and encourages an arbitrary and discriminatory enforcement of the law."[119] The Court, therefore, held that the Jacksonville ordinance was unconstitutionally vague.[120]

Another case that predicated a claim of vagueness on inordinate police discretion was *Kolender v. Lawson*,[121] wherein the United States Supreme Court considered the constitutionality of a California statute[122] that the California appellate court had interpreted as requiring persons who wander on the streets to provide "credible and reliable" identification and "to account for his presence" when requested by a peace officer under circumstances that would justify a valid stop.[123] While the California Court of Appeals had construed the statutory mandate that an individual provide "credible and reliable" identification when requested by a police officer as requiring a reasonable suspicion of criminal activity sufficient to justify a *Terry* stop,[124] "credible and reliable" identifications had been defined by the appellate court as identification "carrying reasonable assurance that the identification is authentic and providing

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116. *Id.* at 164.

117. *Id.* at 166-67.

118. *Id.* at 168.

119. *Id.* at 170.

120. *Id.* at 171.

121. *Kolender*, 461 U.S. at 353-54.

122. *Id.* at 354 n.1 ("Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." (quoting CAL. PENAL CODE ANN. § 647(e) (West 1970))).

123. *Id.* at 355-56 (quoting People v. Solomon, 108 Cal. Rptr. 867, 872-73 (Cal. Ct. App. 1973), *cert. denied*, 415 U.S. 951 (1974)).

124. *See* Terry v. Ohio, 392 U.S. 1, 26 (1968) (providing that the police may conduct a brief investigatory detention of a suspect where the officer has a reasonable suspicion that an individual may have committed, or is about to commit, an offense).

means for later getting in touch with the person who has identified himself."[125]

The Court noted that the statute and case law interpreting it contained "no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification."[126] Thus, a suspect would be held to have violated this statute unless "the officer [was] satisfied that the identification [was] reliable."[127] The statute was construed by the Court as vesting "virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way."[128] The Court saw the result of the statute as entrusting lawmaking "to the moment-to-moment judgment of the policeman on his beat."[129] In addition, the Court noted that this statute furnished "a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,'"[130] and conferred "on police a virtually unrestrained power to arrest and charge persons with a violation."[131] Here, the Court held that this statute was unconstitutionally vague because it allowed "arbitrary enforcement by failing to describe with sufficient particularity" what a citizen must do in order to comply with the statute.[132]

Similar to the decision in *Papachristou*, the United States Supreme Court struck down a Chicago gang loitering ordinance because it failed to set forth an ascertainable standard of guilt in *City of Chicago v. Morales*.[133] In *Morales*, the United States Supreme Court reviewed Chicago's Gang Congregation Ordinance, which prohibited "criminal street gang member[s]" from "loitering" with one another in any public place.[134] For three years, the Chicago police enforced this ordinance,

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125. *Kolender*, 461 U.S. at 356 (quoting *Solomon*, 108 Cal. Rptr. at 872-73).

126. *Id.* at 358.

127. *Id.* at 360.

128. *Id.* at 358.

129. *Id.* at 360 (quoting *Goguen*, 415 U.S. at 575 (quoting Gregory v. City of Chicago, 394 U.S. 111, 120 (1969))).

130. *Id.* (quoting *Papachristou*, 405 U.S. at 170 (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940))).

131. *Id.* (quoting Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring)).

132. *Id.* at 361.

133. 527 U.S. 41, 64 (1999).

134. *Morales*, 527 U.S. at 47 n.2 (1999) (quoting CHICAGO, ILL., MUN. CODE § 8-4-015 (1992)).

> (a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

issuing over 89,000 dispersal orders and arresting approximately 42,000 people for violating the ordinance.[135] When the ordinance was challenged in the Illinois appellate court, it ruled the ordinance was vague and overbroad and, thus, struck the ordinance down.[136] After the Illinois Supreme Court affirmed,[137] the United States Supreme Court inquired into whether the statute was "invalid on its face."[138] The Court noted there were two separate doctrines under which an ordinance may be found unconstitutional.[139] "First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'"[140] Second, the Court pointed out that where a proscription "does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests."[141] The Court decided the First Amendment overbreadth claim advanced in this case did not provide a sufficient basis to invalidate the ordinance because no free speech or right of association was infringed by the anti-loitering ordinance.[142] Moving to the Due Process Clause, the Court stated *in dictum*:

(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.
(c) As used in this Section:
(1) 'Loiter' means to remain in any one place with no apparent purpose.
(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity . . .
(5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned.

CHICAGO, ILL., MUN. CODE § 8-4-015 (1992).

135. *Morales*, 527 U.S. at 49.

136. *Id.* at 50 (citing City of Chicago v. Youkhana, 660 N.E.2d 34, 38, 41-42 (Ill. Ct. App. 1995)). The Illinois Appellate Court concluded that the "ordinance impaired the freedom of assembly of nongang members in violation of the First Amendment to the Federal Constitution and Article I of the Illinois Constitution, that it was unconstitutionally vague, that it improperly criminalized status rather than conduct, and that it jeopardized rights guaranteed under the Fourth Amendment." *Id.*

137. *Id.* The Illinois Supreme Court determined "that the gang loitering ordinance violate[d] due process of law in that it [was] impermissibly vague on its face and an arbitrary restriction on personal liberties." *Id.* (quoting City of Chicago v. Morales, 687 N.E.2d 53, 59 (Ill. 1997)).

138. *Id.* at 52.

139. *Id.*

140. *Id.* (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612-15 (1973)).

141. *Id.* at 52 (citing *Kolender*, 461 U.S. at 358).

142. *Id.* at 52-53.

While we, like the Illinois courts, conclude that the ordinance is invalid on its face, we do not rely on the overbreadth doctrine. We agree with the city's submission

> [A]s the United States recognizes, the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage," or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries.[143]

However, the Court stated it was unnecessary to decide "whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine" inasmuch as a facial vagueness challenge appropriately addressed the claim that the law was invalid.[144] The Court noted that the ordinance did not "simply regulate[] business behavior."[145] Rather, this ordinance was a *criminal* statute that contained *no mens rea*.[146] Also, it "infringe[d] on constitutionally protected rights" and, as such, was subject to a facial vagueness attack.[147]

Applying the vagueness standard to the ordinance, the Court reasoned that a criminal statute could be void for vagueness under two separate rationales.[148] "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory conduct."[149] In this case, the Chicago ordinance prohibited individuals from "loitering," which the enactment itself defined in the following terms: "to remain in any one place with no apparent purpose."[150] Under this broad definition, the Court reasoned that "any citizen of the city of Chicago"

> that the law does not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional. The ordinance does not prohibit speech. Because the term "loiter" is defined as remaining in one place "with no apparent purpose," it is also clear that it does not prohibit any form of conduct that is apparently intended to convey a message. By its terms, the ordinance is inapplicable to assemblies that are designed to demonstrate a group's support of, or opposition to, a particular point of view. [citations omitted] Its impact on the social contact between gang members and others does not impair the First Amendment "right of association" that our cases have recognized.

Id. (citations omitted).

143. *Id.* at 53-54 (quoting Williams v. Fears, 179 U.S. 270, 274 (1900); Kent v. Dulles, 357 U.S. 116, 126 (1958); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *130).

144. *Id.* at 55.

145. *Id.* (quoting *Vill. of Hoffman Estates*, 455 U.S. at 499).

146. *Id.*

147. *Id.*

148. *Id.* at 56.

149. *Id.*

150. *Id.*

would have extreme difficulty in ascertaining whether "he or she had an apparent purpose" while standing in a public place.[151] The Court suggested that individuals simply engaged in conversation with one another might wonder if they had no "apparent purpose."[152] Because citizens might not be aware that they were impermissibly loitering, they would not be receiving fair notice of what conduct the ordinance prohibited in order to conform their behavior prior to receiving notice from a police order to disperse.[153] The Court pointed out that if the loitering was "harmless and innocent," then the police dispersal order would constitute an "unjustified impairment of liberty."[154] Here, if the police were able to arbitrarily decide who was guilty of loitering and who was not, then the law was not providing "advance notice that [would] protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law."[155] Additionally, individuals subject to dispersal orders were not afforded clear instructions as to how comply with the police order.[156] The Court illustrated this problem with the following questions: "[H]ow long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again?"[157] Because the answers to the Court's questions could not be ascertained from the ordinance, the Court concluded that "the entire ordinance fail[ed] to give the ordinary citizen adequate notice of what [was] forbidden and what [was] permitted."[158] The Court held that the ordinance was vague because "no standard of conduct is specified at all."[159]

II. AMBIGUITY AND VAGUENESS DICHOTOMY

The dividing line between statutory vagueness, which renders an enactment void, and statutory ambiguity, which means a law is fixable by judicial interpretation, is not entirely clear.[160] Nevertheless, it is important to not only attempt an explanation of vagueness, as in the previous section, but also one of ambiguity. Scholars have, of course, managed to see a difference by pointing out that while a vague statute does

151. *Id.* at 56-57.
152. *Id.*
153. *Id.* at 58-59 ("No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes." (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939))).
154. *Id.* at 58.
155. *Id.* at 59.
156. *See id.*
157. *Id.*
158. *Id.* at 60.
159. *Id.* (quoting Coates v. Cincinnati, 402 U.S. 611, 614 (1971)).
160. LAFAVE, *supra* note 34, § 2.2(d), at 86, § 2.3(b), at 100-01.

not satisfactorily define the proscribed conduct, one that does define prohibited conduct with some precision, but is subject to two or more different interpretations, is ambiguous.[161]

For instance, an expression is ambiguous when a criminal statute outlaws conduct "P" and "P" can alternatively be read to encompass either conduct "a" or conduct "b" and it is beyond dispute that the defendant engaged only in conduct "a."[162] To illustrate, using Chomsky's linguistic literature, "the sentence, 'flying planes can be dangerous' can mean either 'it can be dangerous to fly planes' or 'planes that are aloft can be dangerous.'[163] While a vague statute is void as unconstitutional, an ambiguous statute may be saved by using a variety of techniques to determine the legislature's intent.[164] To interpret an ambiguous statute, courts may employ three techniques: (1) utilizing rules for interpreting the statute's actual language; (2) using rules directing a court to look outside of the statutory language; and (3) in criminal cases only, relying on the rule of strict construction, which commands an ambiguity to be resolved in the defendant's favor.[165] This latter rule is the rule of lenity.[166]

To interpret the statute's actual language, the courts have recognized five basic principles: (1) a statute that uses different language in different sections is presumed to have a different meaning in each of the different sections; (2) catch-all phrases are limited by the rule of *ejusdem generis* (Latin for "of the same kind") which limits interpretation to a common theme or factor; (3) statutes that set forth a list of exceptions implicitly exclude other exceptions by utilizing the rule of *expressio unius est exclusion alterius* (Latin for "the expression of one thing is the exclusion of another"); (4) where two statutes conflict, the specific statute has priority over the general; and (5) where two statutes conflict, the later enacted statute has priority over the earlier.[167] If these rules do not help the court to resolve the ambiguity or conflict, the court may look beyond the actual statute at the legislative history or another authoritative interpretation.[168]

In addition, because criminal statutes are held to a higher standard of precision and clarity, courts apply the rule of lenity, which one noted

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161. ROBINSON, *supra* note 7, at 76; LAFAVE, *supra* note 34, § 2-3(b), at 100-01.

162. Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 62 (1998).

163. *Id.* (quoting NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX § 4, at 21 (1965)).

164. ROBINSON, *supra* note 7, § 2.2, at 76.

165. *Id.* § 2.3, at 90.

166. *See, e.g.*, Rewis v. United States, 401 U.S. 808, 812 (1971) (citing Bell v. United States, 349 U.S. 81, 83 (1995), and finding Travel Act vague and therefore no violation by out-of-state gamblers frequenting a gambling operation).

167. ROBINSON, *supra* note 7, § 2.3, at 90-91.

168. *Id.* § 2.3, at 92.

scholar aptly called the "junior version of the vagueness doctrine."[169] Although it is not constitutionally required,[170] this rule directs that an ambiguity in a statute be resolved in the defendant's favor.[171] It should be understood that "[t]he motivating purpose of the rule is to provide adequate notice to defendants (due process), and to reinforce the notion that only the legislature has the power to define what conduct is criminal and what conduct is not (separation of powers)."[172]

This rule has been endorsed by the United States Supreme Court in their interpretation of federal law.[173] Although the rule had an established history in English law, the first United States Supreme Court decision to apply it appeared in 1820.[174] In *United States v. Wiltberger*,[175] the Court was faced with the question of whether a federal statute that proscribed manslaughter "on the high seas" could apply to a homicide that occurred on an American merchant marine vessel on a river in the interior of a foreign country.[176] While one section of the Crimes Act of 1790 simply referred to commission of manslaughter "on the high seas," another section of the Act, which addressed murder and other felonies committed on water, specifically referred to commission of such acts "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular [American] State."[177] The government asserted if consideration was given to the "construction of the whole act," one could logically conclude the "obvious intent of the legislature" was to define manslaughter on the high seas as including such a homicide on a foreign river.[178]

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169. PACKER, *supra* note 6, at 95.

170. DRESSLER, *supra* note 14, § 5.04, at 47-48.

171. *Rewis*, 401 U.S. at 812 (citing *Bell*, 349 U.S. at 83).

172. Solan, *supra* note 162, at 58. This rationale appears in *United States v. Bass*, 404 U.S. 336, 347-48 (1971).

173. *See, e.g.*, McNally v. United States, 483 U.S. 350, 359-60 (1987) ("The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."). Here, mail fraud does not encompass schemes to defraud people of their right to honest government; rather, it is interpreted as applying only to schemes to defraud one's property rights. *Id.*; *see also* Liparota v. United States, 471 U.S. 419, 425, 426, 428, 433-34 (1985) (holding rule of lenity commands offense of unlawful acquiring and possessing food stamps requires *mens rea* of knowledge); United States v. United States Gypsum Co., 438 U.S. 422, 435-36 (1978) (holding rule of lenity requires interpretation of federal Sherman Antitrust Act as requiring intent); *Bass*, 404 U.S. at 347-48 (holding rule of lenity requires that offense of receipt, possession or transportation of firearms by a felon in interstate commerce require proof that receipt and possession as well as transportation be in interstate commerce).

174. *See* United States v. Wiltberger, 18 U.S. 76 (1820); *see also* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 357, 358 (1994).

175. 18 U.S. 76.

176. *Id.* at 93-96.

177. *Id.* at 92-96, 98-99.

178. *Id.* at 94-95.

However, the Court responded, "The rule that penal laws are to be construed strictly . . . is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department."[179] The Court added, "The intention of the legislature is to be collected from the words they employ [and] [w]here there is no ambiguity in the words, there is no room for construction."[180] Here, the plain language of the manslaughter statute outlawed a killing "on the high seas," nothing more.[181] This indictment, for the commission of manslaughter that occurred on a river, then, was not based on a "cognizable" offense of the laws of the United States.[182]

In *Jones v. United States*,[183] the Court relied, in part, on the rule of lenity in finding that the commission of "arson of an owner-occupied dwelling" fell outside the scope of federal criminal law.[184] In this case, the defendant was convicted of a federal offense for damage or destruction "by means of fire or an explosive, [of] any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."[185] Upon examination of the defendant's claim that an owner-occupied residence not used for any commercial purpose did not qualify as property "used in" commerce or "affecting" commerce, the Court said the proper inquiry involved considering the *function* of the building itself and how, if at all, that function could be considered commerce-related.[186] The government had claimed the defendant's arson involved "use" of interstate commerce in three ways: (1) the homeowner "used" the dwelling as collateral to get a loan from an out-of-state lender; (2) the homeowner "used" the residence to obtain a casualty insurance policy from an insurer in another state; and (3) the homeowner "used" the dwelling to receive natural gas from another state.[187] However, the Court responded that "[i]t surely is not the common perception that a private, owner-occupied residence is 'used' in the 'activity' of receiving natural gas, a mortgage, or an insurance policy."[188] The Court felt that "active employment" in commerce was what needed to be established, while in this case the only "active employment" was the "everyday living" of the residents of the damaged premises.[189] Applying the rule of

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179. *Id.* at 95.
180. *Id.* at 95-96.
181. *Id.* at 104-05.
182. *Id.* at 105.
183. 529 U.S. 848 (2000).
184. *Jones*, 529 U.S. at 858.
185. *Id.* at 850 (quoting 18 U.S.C. § 844(i) (1994)).
186. *Id.* at 854 (citing United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C.J., concurring in part and dissenting in part)).
187. *Id.* at 855.
188. *Id.* at 856.
189. *Id.*

lenity to the "choice . . . between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[190] This Congress had failed to do and, thus, the defendant was given the benefit of the ambiguity.[191]

The United States Supreme Court has stated that the federal rule of lenity only applies where a court determines that a "grievous ambiguity or uncertainty" exists.[192] The Court limits the use of lenity since "most statutes are ambiguous to some degree."[193] In addition, a statute does not suffer the infirmity of ambiguity unless, "'after seizing everything from which aid can be derived,' [the Court] can make 'no more than a guess as to what Congress intended.'"[194] Thus, if the Court understands what Congress intended in choosing a particular word or phrase in a criminal statute, there is neither ambiguity nor need to resort to the rule of lenity.[195]

Also, "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not'" establish ambiguity but rather breadth.[196] In other words, merely because a statute is all-encompassing does not establish ambiguity. When the rule does apply, the law in question should not be interpreted in a manner which defies common sense nor should the law be given a "forced, narrow or overstrict construction."[197]

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190. *Id.* at 858 (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952)).

191. *Id.* at 859.

192. Staples v. United States, 511 U.S. 600, 619 n.17 (1994) (quoting Chapman v. United States, 500 U.S. 453, 463 (1991)). In *Staples*, for example, the Court found it unnecessary to employ the rule of lenity in concluding that a conviction for possessing an unregistered machine gun required proof of scienter. *Id.* The Court established that crimes without a *mens rea* have a most disfavored status in criminal law. *Id.* at 605-06. In addition, the Court had not previously held that "statutes silent with respect to *mens rea* are ambiguous." *Id.* at 619.

193. Muscarello v. United States, 524 U.S. 125, 138 (1998).

194. Reno v. Koray, 515 U.S. 50, 65 (1995) (quoting Smith v. United States, 508 U.S. 223, 239 (1993); Ladner v. United States, 358 U.S. 169, 178 (1958)). *Reno* held that a prisoner who spent time at a community treatment center while "released" on bail was not in "official detention" entitling him to sentence credit. *Id.*

195. *See, e.g.*, *Muscarello*, 524 U.S. at 138-39 (holding that where Congress clearly intended to use a broad definition of "carry" for purposes of outlawing the carrying of a firearm during a drug transaction, there existed no need to consider rule of lenity); United States v. Walton, 514 F.2d 201, 204 (D.C. Cir. 1975) (finding that where Congress clearly intended to outlaw all forms of marijuana, there was no ambiguity in a federal statute that only referenced one species of marijuana).

196. Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 212-13 (1998) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)). *Yeskey* held that the American Disabilities Act "unambiguously extends to state prison inmates." *Id.*

197. LAFAVE, *supra* note 34, § 2.2(d), at 84.

While the federal courts and many state courts[198] rely on the rule of lenity, other states have abolished the rule.[199] At the core of this movement to eliminate the rule lies the notion that its implementation oftentimes runs contrary to legislative intent.[200] The Model Penal Code rejects the rule of lenity and states:

> The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, insofar as such criteria are not decisive, to further the general purposes stated in this Section.[201]

This *fair import* rule is considered less "strict" because it allows for interpretation in a way that does not frustrate the legislative purpose.[202] The rule seeks to ensure that some reasonable notice of the offense is possible.[203] This strikes a compromise between the principles of legality and countervailing interests.[204] However, it is not clear that the rule of lenity and the rule of fair import generate a significant difference in application.[205] Arguably, the fair import rule allows a court more leeway to follow legislative intent that conflicts with a literal reading, but this is mere speculation.[206] The difference may lie in the use of judicial discretion in the fair import rule.[207] This may be the reason some courts prefer the rule of strict construction since it permits discretion yet appears mechanical and thereby leaves a decision less open to criticism.[208]

III. OVERBREADTH AND VAGUENESS DICHOTOMY

The concepts of overbreadth and vagueness are, in some sense, distinct and yet, in other regards, inseparable. As mentioned previously, "[a]

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198. *See, e.g.*, People v. Davis, 766 N.E.2d 641, 644, 647 (Ill. 2002) (stating in dicta that rule of lenity would compel a finding that a pellet gun is not a "dangerous weapon" within meaning of Illinois armed violence statute).

199. DRESSLER, *supra* note 14, § 5.04. *Compare* Kahan, *supra* note 174, at 346 (criticizing the doctrine), *with* Solan, *supra* note 162, at 59-60 (defending the rule of lenity).

200. ROBINSON, supra note 7, § 2.3, at 93 ("The rule can frustrate a legislature's obvious intent on what can be an important issue and risks bringing the criminal justice system into disrepute, subjecting it to criticism that it is a game governed by technicalities having little reference to fairness or justice."); DRESSLER, *supra* note 14, § 5.04, at 47 ("A statute should be interpreted to further, not frustrate, the legislative policies behind the specific law in question.").

201. MODEL PENAL CODE § 1.02(3) (1962).

202. ROBINSON, *supra* note 7, at 94.

203. *Id.*

204. *Id.*

205. *Id.* at 96.

206. *Id.*

207. *Id.*

208. *Id.*

statute is void for vagueness if it fails to give adequate notice to people of ordinary intelligence concerning the conduct it proscribes or if it invites arbitrary and discriminatory enforcement."[209] If a party challenges an enactment based on the assertion that one cannot determine whether the regulation intrudes upon otherwise "innocent terrain," then the complaint is one of vagueness.[210] On the other hand, if a challenge is based on an objection that the regulation *does*, in fact, intrude into territory where it does not belong, then the claim is one of overbreadth.[211]

> While a statute may often be found both vague and overbroad at the same time, the two concepts are distinct. A statute is too vague when it fails to give fair notice of what it prohibits. It is overbroad when its language, given its normal meaning, is so broad that the sanctions may apply to conduct which the state is not entitled to regulate.[212]

Nevertheless, it has been recognized that the possible "vagueness of a law affects overbreadth analysis."[213] When a court looks at a claim of overbreadth and considers whether "a substantial amount of constitutionally protected conduct" is involved, it must examine both the uncertain and the clear reach of the proscription in order to decide whether the nebulous aspect of the proscription may be discouraging the citizenry from engaging in protected speech or behavior.[214]

In any event, some discussions of vagueness confuse the concepts of "vagueness" and "overbreadth." In some sense, this is a product of seemingly inconsistent statements and analyses which appear in the case law. This section will first discuss overbreadth, followed by discussions of "facial vagueness" and "vagueness as applied."

A. First Amendment (or Facial) Overbreadth

The overbreadth doctrine is atypical of ordinary constitutional adjudication because it does not insist on the traditional requirements of standing.[215] The United States Supreme Court "has altered its traditional

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209. Schwartzmiller v. Gardner, 752 F.2d 1341, 1345 (9th Cir. 1984).

210. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 n.9 (1982) (stating that if the respondent's objection to the statute is based on the question of "whether the ordinance regulates items with some lawful uses, then it is complaining of vagueness").

211. *Vill. of Hoffman Estates*, 455 U.S. at 497 n.9; *see also Schwartzmiller*, 752 F.2d at 1346 ("A law is overbroad if it prohibits not only acts the legislature may forbid, but also constitutionally protected conduct.").

212. Ariz. *ex rel.* Purcell v. Superior Court, 535 P.2d 1299, 1301 (Ariz. 1975).

213. *Vill. of Hoffman Estates*, 455 U.S. at 494 n.6.

214. *Id.* at 494.

215. *See* Broadrick v. Oklahoma, 413 U.S. 601, 610-12 (1973) (reiterating that under the traditional rule of standing which governs constitutional adjudication, it is impermissible for a person to challenge a statute on the grounds that the statute infringes upon other persons' constitutional rights; but in regards to First Amendment overbreadth challenges, there exists no standing requirement); *see also* New York v. Ferber, 458 U.S. 747, 767-68 (1982) (declaring that the

rules of standing to permit -- in the First Amendment area -- 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'"[216] Therefore, an individual may allege that a statute is unconstitutionally overbroad and deprives either himself or another person of his or her First Amendment rights.[217] The Court's reasoning for this deviation from the traditional standing requirement rests upon "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[218]

The First Amendment overbreadth doctrine prevents *any* enforcement of a law that interferes with free speech "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."[219] Inasmuch as the effect of this doctrine is so dramatic, by allowing preenforcement challenges without any showing of traditional standing, this "strong medicine" has historically "been employed by the Court sparingly and only as a matter of last resort."[220] Furthermore, these claims, "if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct."[221] Thus, where a Jehovah's Witness was convicted of a common law breach of the peace for playing a phonograph record attacking the Catholic Church in the presence of two Catholics, the Court reversed the defendant's conviction but refused to void the offense "in toto because it was capable of some unconstitutional applications."[222]

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traditional rule of standing "reflects two cardinal principles of our constitutional order: the personal nature of constitutional rights and prudential limitations on constitutional adjudication" and that the First Amendment overbreadth doctrine is an exception to this principle).

216. *Broadrick*, 413 U.S. at 612 (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)).

217. *Id.* at 611-12.

218. *Id.* at 612.

219. *Id.* at 613.

220. *Id.* However, the Court is not disinclined to use this doctrine. For example, after stating that the Communications Decency Act's "coverage is wholly unprecedented," the Court ruled it to be facially overbroad. Reno v. ACLU, 521 U.S. 844, 877-82 (1997) (striking down the Communications Decency Act which prohibited transmission of obscene or indecent communications by means of telecommunication to persons under 18, or sending patently offensive communications through use of interactive computer service to persons under 18, because the Act was contrary to the First Amendment); *see also* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002) (holding that the ban on "virtual child pornography" contained in Child Pornography Prevention Act of 1996 was overbroad and contrary to the First Amendment).

221. *Broadrick*, 413 U.S. at 614.

222. *Id.* at 613-14 (discussing Cantwell v. Connecticut, 310 U.S. 296, 308, 311 (1940)).

This concept of overbreadth, also referred to as "facial overbreadth,"[223] clearly arises where a criminal statute seeks to regulate "only spoken words" protected by the First Amendment.[224] In addition, these challenges have been allowed where a broadly worded statute might burden innocent associations,[225] "regulate the time, place, and manner of expressive or communicative conduct,"[226] or give "standardless discretionary power to local functionaries" to refuse such expressive conduct in advance, thereby creating "unreviewable prior restraints on First Amendment rights."[227] As stated, overbreadth challenges have "been limited with respect to conduct-related regulation."[228] When a defendant alleges that a statute is overbroad and vague, the reviewing court first focuses on whether the statute "reaches a substantial amount of constitutionally protected conduct."[229] The substantial overbreadth requirement applies to challenges to legislation that "arise in defense of a criminal prosecution as well as civil enforcement *or* actions seeking a declaratory judgment."[230] In making this evaluation, a court must measure the ambiguous as well as the unambiguous scope of the law in an effort to determine if it is deterring innocent citizens from engaging in licit speech or conduct.[231] When ruling on an overbreadth challenge, a court must initially attempt to interpret the enactment in a fashion that avoids a finding of unconstitutionality.[232] If the statute does not implicate a substantial amount of constitutionally protected conduct, then the statute is not overbroad.[233] Next, the court must examine the facial vagueness challenge (discussed more fully below). Assuming the stricture impedes no constitutionally protected conduct, the court should sustain a challenge only if the law "is impermissibly vague in all of its applications."[234] In

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223. *Id.* at 612; *see also* Byrum v. Texas, 762 S.W.2d 685, 687 (Tex. Ct. App. 1988) (stating that a claim of "facial overbreadth" may arise where a statute either intrudes on the First Amendment or impedes some other "fundamental interest" that restricts one's "conduct").

224. *Broadrick*, 413 U.S. at 612 (quoting Gooding v. Wilson, 405 U.S. 518, 520 (1972)).

225. *Id.* (citing cases such as *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), where the Court granted injunctive relief while striking down a New York Statute which made treasonable or seditious acts grounds for removal from state employment).

226. *Id.* at 612-13 (citing cases such as *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940), where a statute forbidding loitering and picketing was successfully challenged on overbreadth grounds because the law also restricted "nearly every practicable, effective means" of educating the public about a labor dispute).

227. *Id.* at 613 (citing cases such as *Cox v. Louisiana*, 379 U.S. 536 (1965), where the Court found as overbroad a general breach of the peace statute which punished people for expressing unpopular views that might agitate others).

228. *Ferber*, 458 U.S. at 766.

229. *Vill. of Hoffman Estates*, 455 U.S. at 494 (quoted in State v. Dixon, 998 P.2d 544, 547 (Mont. 2000)).

230. *Ferber*, 458 U.S. at 772-73 (emphasis added).

231. *Vill. of Hoffman Estates*, 455 U.S. at 494 n.6.

232. *Ferber*, 458 U.S. at 769 n.24.

233. *Vill. of Hoffman Estates*, 455 U.S. at 494 (quoted in *Dixon*, 998 P.2d at 547).

234. *Id.* at 494-95.

contrast to the First Amendment overbreadth challenge, a vagueness challenge, not involving First Amendment freedoms but mere *conduct*, does not allow an individual to challenge the possible inappropriate application of the law to others.[235]

In *Lewis v. City of New Orleans*,[236] the United States Supreme Court invoked the overbreadth doctrine to strike down a municipal ordinance restricting "opprobrious language." In that case, the defendant had been found guilty of an offense that made it unlawful and a breach of the peace for any person "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."[237] The charge arose out of a verbal confrontation between the defendant and a police officer that included utterances of profanity directed at the officer.[238] In its analysis, the Court ultimately concluded "opprobrious" language embraced words that did not inflict injury or "incite an immediate breach of the peace."[239] In addition, it observed that the First and Fourteenth Amendments protect speech, including that which might be deemed "vulgar or offensive."[240] Because the ordinance punished "only spoken words" and was "susceptible of application to protected speech," it was "constitutionally overbroad and therefore . . . facially invalid."[241]

Just as the Court has employed the overbreadth doctrine to void legislation where a defendant has raised it in defense of a criminal charge,[242] it has relied on it to undo an enactment in a pre-enforcement action.[243] For example, in *Dombrowski v. Pfister*,[244] the plaintiffs sought an injunction, under provisions contained in two federal civil rights statutes,[245] restraining various Louisiana officials from prosecution or other enforcement of the Louisiana Subversive Activities and Communist Control Law and the Communist Propaganda Control Law.[246] The plaintiffs

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235. *Id.* at 495.

236. 415 U.S. 130, 132 (1974).

237. *Lewis*, 415 U.S. at 132 (quoting NEW ORLEANS, LA., ORDINANCE 828 M.C.S. § 49-7).

238. *Id.* at 132 n.1.

239. *Id.* at 133 (quoting *Gooding*, 405 U.S. at 525).

240. *Id.* at 134.

241. *Id.*

242. *See, e.g.*, Plummer v. City of Columbus, 414 U.S. 2, 2 (1973) (per curiam) (holding municipal ordinance outlawing use of "menacing, insulting, slanderous, or profane language" was invalid on its face); *Gooding*, 405 U.S. at 519-21 (holding Georgia statute outlawing use of "opprobrious words or abusive language, tending to cause a breach of the peace" was on its face unconstitutionally vague and overbroad under the First and Fourteenth Amendments).

243. *See, e.g.*, *Ashcroft*, 535 U.S. at 241-43 (affirming pre-enforcement challenge of prohibition against "virtual child pornography" contained in federal Child Pornography Prevention Act of 1996 on First Amendment overbreadth grounds).

244. 380 U.S. 479 (1965).

245. *Dombrowski*, 380 U.S. at 484 n.2 (citing 28 U.S.C. § 2283 (1964); 42 U.S.C. § 1983 (1964)).

246. *Id.* at 481-82.

were several civil rights activists who were concerned about the State of Louisiana's possible use of this legislation to curtail the activities of those asserting or vindicating the rights of African-American citizens.[247] The Court began its consideration of the plaintiffs' claim by noting that concerns of federalism normally required postponement of consideration of federal issues that might arise in a state prosecution until state court processes had run their course.[248] However, the Court observed that allegations in the complaint in this case "depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights."[249] Specifically, it was suggested that "substantial loss or impairment of freedoms of expression" violative of appellants' First Amendment rights would occur in the interim between commencement of prosecution by the state and federal review of any adverse determination.[250] When faced with such a claim, due to "the sensitive nature of constitutionally protected expression," the Court stated "we have not required that all of those subject to overbroad regulations risk prosecution to test their rights."[251] To hold otherwise, "free expression – of transcendent value to all society, and not merely to those exercising their rights – might be the loser."[252] Indeed, the Court stated it had "consistently allowed attacks on overly broad statutes" without insisting that the complainant "demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity."[253] This exception to the usual rules of standing was developed, in the context of the First Amendment, to insure against "the existence of a penal statute susceptible of sweeping and improper application."[254] Such an exception avoids the spector of "case by case" review of the applicability of an enactment "tested only by those hardy enough to risk criminal prosecution" in order to challenge its integrity while free expression hangs in the balance awaiting "the outcome of protracted litigation."[255]

In the instant case, several of the plaintiffs had been arrested by Louisiana state and local police, had their offices raided and records seized—all of which was voided by subsequent court rulings.[256] Nevertheless, state officials continued to threaten prosecution, while repeatedly

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247. *Id.* at 482.
248. *Id.* at 483-85.
249. *Id.* at 485.
250. *Id.* at 486.
251. *Id.*
252. *Id.*
253. *Id.* (citing *Thornhill*, 310 U.S. at 97-98; NAACP v. Button, 371 U.S. 415, 432-33 (1963); Aptheker v. Sec'y of State, 378 U.S. 500, 515-17 (1964); United States v. Raines, 362 U.S. 17, 21-22 (1960)).
254. *Dombrowski*, 380 U.S. at 487 (quoting *NAACP*, 371 U.S. at 433).
255. *Id.*
256. *Id.* at 487-89.

announcing their belief that the plaintiffs' organization was a "subversive or Communist-front organization."[257] The consequence was the paralyzation of the plaintiffs' efforts to vindicate minority civil rights.[258] As a result, the Court concluded that the individual plaintiffs' refusals to comply with the Louisiana Subversive Activities and Communist Control Law by not registering as members of a Communist-front organization—which had given rise to the plaintiffs' criminal indictments—was protected by the plaintiffs' due process rights inasmuch as what constituted "a subversive organization" was "unduly vague, uncertain and broad."[259] Accordingly, plaintiffs' "failure to register as member[s] of a Communist-front organization" was not actionable by the State and thus ruled invalid.[260] These enactments challenged by the plaintiffs, said the Court, were "void on their face."[261]

Yet another case where the Court entertained an overbreadth challenge was *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[262] wherein the Court reviewed and upheld a drug paraphernalia ordinance. The municipal ordinance in question made it "unlawful for any person 'to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor.'"[263] Plaintiff Flipside, in "a pre-enforcement facial challenge," alleged that the statute was unconstitutionally overbroad as well as vague.[264] The Court began its analysis by stating that "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail."[265] The Court noted that in this context, a facial challenge of a statute "means a claim that the law is 'invalid *in toto* – and therefore incapable of any valid application.'"[266]

To determine whether the drug paraphernalia ordinance was overbroad, the Court examined whether the ordinance violated "Flipside's First Amendment rights or [was] overbroad because it [inhibited] the First Amendment rights of other parties."[267] The Court held that the ordinance was not overbroad because it did not infringe on the "noncommer-

257. *Id.* at 488.
258. *Id.* at 488-89.
259. *Id.* at 493-94.
260. *Id.* at 494-95.
261. *Id.* at 497.
262. 455 U.S. 489 (1982).
263. *Vill. of Hoffman Estates*, 455 U.S. at 492 (citing VILL. OF HOFFMAN ESTATES, ILL., MUN. CODE § 8-7-16 (1978)).
264. *Id.* at 491-93.
265. *Id.* at 494.
266. *Id.* at 495 n.5 (quoting Steffel v. Thompson, 415 U.S. 452, 474 (1974)).
267. *Id.* at 495.

cial speech of Flipside or other parties" inasmuch as it only regulated and licensed "the sale of items displayed 'with' or 'within proximity of' literature encouraging illegal use of cannabis or illegal drugs.'"[268] The Court ruled that, even assuming commercial speech was implicated by the ordinance, "it is irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of other persons, because the overbreadth challenge does not apply to commercial speech."[269] Thereafter, the Court also rejected Flipside's claim that the ordinance was overbroad in that it outlawed "innocent" or "lawful" behavior[270] and that it was unconstitutionally vague.[271]

In *New York v. Ferber*,[272] the United States Supreme Court expounded at great length on what it described as the "First Amendment overbreadth doctrine" when it evaluated the troublesome subject of child pornography.[273] In *Ferber*, the Court reviewed a New York statute[274] that criminalized "promoting a sexual performance by a child."[275] In this case, the defendant was a proprietor of a bookstore located in Manhattan, New York.[276] The defendant's bookstore specialized in "sexually orientated products."[277] After the defendant sold to an undercover police officer two films "depicting young boys masturbating,"[278] the defendant was prosecuted and convicted of violating section 263.15 of the New York Penal Law, which read that "[a] person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."[279] "Sexual performance" was defined as including any "sexual conduct by a child less than sixteen years of age."[280] Following the defendant's conviction in the trial court, the New York Court of Appeals reversed the conviction after deciding that section 263.15 was "overbroad because it prohibited the distribution of materials produced outside the State, as well as materials, such as medical books and educational sources, which 'deal with adoles-

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268. *Id.* at 496 (quoting VILL. OF HOFFMAN ESTATES, ILL., LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS (1978)).

269. *Id.* at 496-97.

270. *Id.* at 497 n.9.

271. *Id.* at 505.

272. 458 U.S. 747 (1982).

273. *Ferber*, 458 U.S. at 768.

274. *Id.* at 750 (citing N.Y. PENAL LAW §§ 263.00 to .25 (McKinney 1981)).

275. *Id.* at 751 (quoting N.Y. PENAL LAW § 263.15 (McKinney 1981)).

276. *Id.* at 751-52.

277. *Id.* at 752.

278. *Id.*

279. *Id.* at 751 (quoting N.Y. PENAL LAW § 263.15 (McKinney 1981)).

280. *Id.* (quoting N.Y. PENAL LAW § 263.00(1) (McKinney 1981), and citing N.Y. PENAL LAW § 263.00(3) (McKinney 1981) (defining "sexual conduct")).

cent sex in a realistic but nonobscene manner.'"[281] However, the United States Supreme Court reversed the New York Court of Appeals decision, holding that section 263.15 was not overbroad.

After concluding this enactment did not restrict the production and distribution of material protected by the First Amendment,[282] the Court turned to a consideration of whether the statute was unconstitutionally overbroad because it curtailed "the distribution of material with serious literary, scientific, or educational value *or* material which [would] not threaten the harms" the state sought to combat.[283] While noting that "[t]he traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court,"[284] it explicitly ruled that "[w]hat has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle."[285] The Court observed that this "doctrine is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'"[286] The Court then reiterated its prior pronouncements on the subject:

> The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." [This Court has held] that the overbreadth involved be 'substantial' before the statute involved will be invalidated on its face.[287]

The Court next pointed out that it had previously explained the basis for this requirement:

> [T]he plain import of our cases is . . . that facial overbreadth adjudication is an exception to [the] traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct – even if expressive –

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281. *Id.* at 752-53 (quoting *Ferber*, 422 N.E.2d at 526).
282. *Id.* at 765-66.
283. *Id.* at 766 (emphasis added).
284. *Id.* at 767.
285. *Id.* at 768.
286. *Id.* (citing Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980)).
287. *Id.* at 769 (citing *Broadrick*, 413 U.S. at 613, 615).

> falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.[288]

The Court then turned to an explanation as to the reason overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep" where conduct, and not mere speech, is at issue.[289]

> The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation. This observation appears equally applicable to the publication of books and films as it is to activities, such as picketing or participation in election campaigns, which have previously been categories as involving conduct plus speech. . . .
>
> Indeed, the Court's practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law *in toto*, but rather to reverse the particular conviction.
>
> . . . .
>
> . . . [T]he fact that a criminal prohibition is involved does not obviate the need for the inquiry or *a priori* warrant a finding of substantial overbreadth.[290]

In addition, the Court stated that the nature of the penalty to be imposed for violating a statute was "relevant in determining whether demonstrable overbreadth [was] substantial."[291]

Applying the above principle to the statute at issue, the Court held that section 263.15 was "not substantially overbroad" because the statute could only be impermissibly applied in a "tiny fraction of the materials within the statute's reach."[292] The Court concluded by stating that "whatever overbreadth may exist should be cured through case-by-case analy-

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288. *Id.* at 770 (quoting *Broadrick*, 413 U.S. at 615).
289. *Id.* (quoting *Broadrick*, 413 U.S. at 615).
290. *Id.* at 772-73.
291. *Id.* at 773.
292. *Id.*

sis of the fact situations to which its sanctions, assertedly, may not be applied."[293]

B. Facial Vagueness

Although a statute may be found not to be overbroad because it does not reach constitutionally protected conduct, it may nevertheless be held to be vague on its "face" or "as applied."[294] As earlier stated, a facial challenge is a challenge that the law is totally invalid and incapable of any constitutional application.[295] When considering whether a statute is facially invalid, a court must "consider any limiting construction that a state court or enforcement agency has proffered."[296]

In *Young v. American Mini-Theaters*,[297] the United States Supreme Court extended the "substantial" deterrent effect requirement, which it had developed in connection with facial overbreadth claims, to the analysis of whether a statute was facially vague.[298] The Court indicated that where a statute's arguable vagueness was "real and substantial," and not "readily subject to a narrowing construction," a defendant whose own speech might be unprotected could challenge the statute if "the very existence of [the] statute[] may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression" due to the "overriding importance of maintaining a free and open market for the interchange of ideas."[299]

Facial vagueness challenges have been approved in two circumstances. First, a statute may be challenged on its face when it has the capacity "to chill constitutionally protected conduct, especially conduct protected by the First Amendment."[300] Thus, the Tenth Circuit has concluded:

> [A court will] allow a person who is prosecuted for conduct which the state may constitutionally forbid to challenge the statute as vague on its face, rather than restricting him to challenging it as applied to his conduct, because those who will refrain from speech will never have a chance to make their claims in court. In this way the claims of those

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293. *Id.* at 773-74 (quoting *Broadrick*, 413 U.S. at 615-16).

294. *Dixon*, 998 P.2d at 547; *Vill. of Hoffman Estates*, 455 U.S. at 497.

295. *Vill. of Hoffman Estates*, 455 U.S. at 495 n.5; Steffel v. Thompson, 415 U.S. 452, 474 (1974).

296. *Vill. of Hoffman Estates*, 455 U.S. at 495 n.5 (citing Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)).

297. 427 U.S. 50 (1976).

298. *Young*, 427 U.S. at 59-60 (citing *Broadrick*, 413 U.S. at 611-12, 615).

299. *Id.* at 60 (citing Erznozik v. City of Jacksonville, 422 U.S. 205, 216 (1975)).

300. United States v. Gaudreau, 860 F.2d 357, 360 (10th Cir. 1988) (citing Colautti v. Franklin, 439 U.S. 379, 390-91, 394, 396 (1979); Lauzetta v. New Jersey, 306 U.S. 451 (1939)).

> who would be silenced are heard. Vagueness and overbreadth challenges are similar in this respect.[301]

Second, pre-enforcement challenges are also appropriate where the challenger attacks the statute as "vague in all its applications," which necessarily means that the statute is void on its face.[302]

The 1971 case of *Coates v. City of Cincinnati*[303] offers an illustration of the Court's willingness to find a statute vague on its face, contrary to due process, and violative of the First Amendment. In *Coates*, several defendants had been convicted under a Cincinnati ordinance which made it illegal for "three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, . . . and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings."[304] In its consideration of the defendants' appeal, the Court concluded that the ordinance was vague, not in the sense that it required compliance with an "imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."[305] An examination of this statute suggested its enforcement could entirely turn on "whether or not a policeman [was] annoyed" by a particular assembly.[306] Furthermore, the Court observed more than due process vagueness was involved in that the ordinance was at odds with First Amendment rights of free assembly and association.[307] The Court declared that the First and Fourteenth Amendments could not be dependent on whether a particular assembly was annoying to "some people."[308] This ordinance provided a recipe for discriminatory enforcement against assemblages of groups whose "ideas . . . lifestyle, or . . . physical appearance" engender resentment by "the majority of their fellow citizens."[309] In this case, where the Court ultimately reversed defendants' conviction on vagueness grounds, it was obvious to the Court that this ordinance had the capacity to limit the exercise of First Amendment freedoms, and at the same time, result in quasi-criminal sanctions.[310] Moreover, while not explicitly discussed in the opinion, an additional problem with this ordinance was that a conviction could be predicated on the *conduct* of the group *without* regard to any *mens rea*.

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301. *Id.*
302. *Id.* at 360-61.
303. 402 U.S. 611, 614-15 (1971).
304. *Coates*, 402 U.S. at 612 n.1 (quoting CINCINNATI, OH., CODE OF ORDINANCES § 901-L6 (1956)).
305. *Id.* at 614.
306. *Id.*
307. *Id.* at 615.
308. *Id.*
309. *Id.* at 616.
310. *Id.* at 614-16.

The case of *Colautti v. Franklin*[311] provides another example of a statute that was determined to be void on its face. In this case, the Court reviewed the Pennsylvania Abortion Control Act, which contained a section that required persons, including physicians, to exercise the same standard of care to preserve a fetus' life and health as would be required in the case of a fetus intended to be born alive if the fetus was "viable" or if there was "sufficient reason to believe that the fetus may be viable."[312] Inasmuch as the "may be viable" language set out either a subjective or mixed subjective and objective standard test for viability, the Court ruled in this pre-enforcement action brought by a group of physicians that a person of ordinary intelligence would not have fair notice of its scope.[313] In addition, the required "standard of care" provision was deemed equally vague.[314] The Court's concern regarding the language in question was aggravated by the fact that the measure included criminal penalties, contained no *scienter*, and carried the potential of inhibiting the exercise of constitutionally protected rights.[315]

Notwithstanding *Coates* and *Coluatti*, it should be recognized that claims of facial vagueness that prove successful are the exception rather than the rule. The difficulties inherent in advancing a facial challenge are illustrated in the following two cases. In *United States v. Gaudreau*,[316] the defendants were prosecuted under the Colorado commercial bribery statute, which was used as a component of a federal RICO indictment.[317] The state commercial bribery statute was challenged as vague on the ground that its prohibition of a "knowing violation of a duty of fidelity" to a corporation by an officer of the corporation was vague.[318] The federal district court agreed and dismissed the RICO counts of the indictment as both facially vague and vague as applied.[319] The United States Court of Appeals for the Tenth Circuit reversed.[320] Here, the Tenth Circuit, in rejecting the facial vagueness claim, stated that the Colorado statute did not threaten to chill constitutionally protected conduct and, inasmuch as it had been applied to the defendants, it would be necessary to conduct an examination of the statute *as applied* for vagueness, in light of the conduct for which the defendants had been charged.[321] After consulting various treatises, the Tenth Circuit concluded that the defendants had fair notice of the meaning of the language they had challenged

311. 439 U.S. 379 (1979).
312. *Coulautti*, 439 U.S. at 380-81 n.1 (quoting PA. STAT. ANN. tit. 35, § 6605(a) (West 1977)).
313. *Id.* at 388-97.
314. *Id.* at 397.
315. *Id.* at 391, 394-96.
316. 860 F.2d 357 (10th Cir. 1988).
317. *Gaudreau*, 860 F.2d at 359.
318. *Id.* at 358 (quoting COLO. REV. STAT. § 18-5-401(1)(a), (d) (1986)).
319. *Id.* at 358-59.
320. *Id.* at 358.
321. *Id.* at 361.

and that the statute did not lend itself to arbitrary enforcement standards.[322]

Another case where a facial vagueness claim failed was *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*,[323] part of which was discussed in the previous section.[324] In that case, which reflects both an in-depth discussion of facial overbreadth and facial vagueness, the United States Supreme Court pointed out that in cases involving a facial challenge to the overbreadth and vagueness of a statute, the reviewing court must initially ascertain if the statute is overbroad by examining whether the statute touches "a substantial amount of constitutionally protected conduct."[325] If the statute fails to do so, the reviewing court should then proceed to the facial vagueness challenge and, if it finds the statute does not cover constitutionally protected conduct, it must "uphold the challenge only if the enactment is impermissibly vague in all of its applications."[326]

The Court explained that a complainant who commits some acts that are "clearly proscribed" in the enactment "cannot complain of the vagueness of the law as applied to the conduct of others."[327] In other words, a reviewing court should "examine the complainant's conduct before analyzing other hypothetical applications of the law."[328] Also, when evaluating any facial challenge, the Court in *Flipside* noted a reviewing court must consider any "limiting construction" that a lower court or enforcement agency has provided.[329] Moreover, when the reviewing court applies the tests of whether the statute under consideration (1) provides the citizenry with *fair warning* of what it prohibits and (2) contains *explicit standards* that avoid arbitrary and discriminatory application, the court should not insist that these "standards . . . be applied mechanically."[330] Rather, the "degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment."[331] A greater tolerance has been expressed with "civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."[332] If the stricture requires government proof of *scienter*, this mental state requirement

322. *Id.* at 362-64.
323. 455 U.S. 489 (1982).
324. *See supra* notes 262-71 and accompanying text.
325. *Vill. of Hoffman Estates*, 455 U.S. at 494.
326. *Id.* at 494-95.
327. *Id.* at 495.
328. *Id.*
329. *Id.* at 495 n.5.
330. *Id.* at 498.
331. *Id.*
332. *Id.* at 498-99.

"may mitigate a law's vagueness."[333] The most important factor, however, "affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."[334]

Following the Court's rejection of the complainant's pre-enforcement overbreadth challenge,[335] the Court subjected the drug paraphernalia ordinance to a vagueness analysis.[336] The Court determined that the ordinance simply regulated the complainant's "business behavior" and observed that it required proof of *scienter* with respect to the alternative "marketed for use" standard.[337] Also, this ordinance carried a nominal civil sanction.[338] Although the Village conceded that the ordinance was "'quasi-criminal,' and its prohibitory and stigmatizing effect [would consequently] warrant a relatively strict test,"[339] the Court concluded that this facial vagueness challenge could not succeed inasmuch as whatever analysis might be used to examine "either a quasi-criminal or a criminal law, the ordinance [was] sufficiently clear as applied to Flipside."[340]

First, Flipside's suggestion that the language outlawing distribution of paraphernalia "designed for use" or "marketed for use" with cannabis or drugs could not withstand a facial challenge, which implied that the statute was vague in all its applications, was contradicted by the facts that the language covered "at least some of the items that Flipside sold" and Flipside's co-operator admitted that the business sold items "principally used for illegal purposes."[341] And second, the *scienter* requirement belied the notion that one might be entangled innocently in the web of the enactment.[342] Thus, one could not seriously assert that this measure offered *this complainant* insufficient "fair warning" as to its reach.[343] Additionally, regarding the arbitrary and discriminatory application claim, the absence of such evidence at this juncture militated the conclusion that this concern be best addressed when any such problem actually arise.[344]

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333. *Id.* at 499.
334. *Id.*
335. *Id.* at 496-97; *see supra* notes 262-71 and accompanying text.
336. *Vill. of Hoffman Estates*, 455 U.S. at 497-501.
337. *Id.* at 499.
338. *Id.*
339. *Id.*
340. *Id.* at 500.
341. *See id.* at 500, 502.
342. *See id.* at 502.
343. *See id.* at 498, 502.
344. *Id.* at 503-04.

Gaudreau and *Flipside* together reflect the substantial barriers that sit in the path of a facial vagueness challenge. First, if the enactment does not somehow have the potential for intrusion into constitutionally protected terrain, as turned out to be the case with *Gaudreau*, then the claim comes to an abrupt halt.[345] Second, even when the defendant's assertion proceeds beyond the first obstacle just mentioned, if the complainant is unable to convince the reviewing court that the statute is vague "in all its applications," as occurred in *Flipside*, it fails.[346] As one court stated, "facial vagueness review is not common because ordinary concerns of judicial restraint do not permit a party whose particular conduct is adequately described by a criminal statute 'to attack [the statute] because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit.'"[347]

C. *Vagueness As Applied*

A defendant may bring an "as applied" vagueness challenge on the grounds that a statute failed to clearly define the criminally proscribed conduct with which he has been charged.[348] Unlike a facial challenge, which allows an attack on the entire enactment, an "as applied" challenge focuses only on whether the statute was inappropriately applied to the complainant's conduct."[349] In an "as applied" challenge, the court examines the statute in light of the facts of the case at bar.[350] In other words, an "as applied" vagueness challenge must be decided on its own facts.[351]

"In scrutinizing a statute for intolerable vagueness as applied to specific conduct," a reviewing court must interpret it consistently with any judicial construction preferred by the jurisdiction's highest court.[352] The question, therefore, is whether the challenged statute, as well as judicial

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345. *Gaudreau*, 860 F.2d at 360.

346. *Vill. of Hoffman Estates*, 455 U.S. at 497.

347. *Schwartzmiller*, 752 F.2d at 1346 (quoting Parker v. Levy, 417 U.S. 733, 756 (1974)).

348. *See id.* at 1348-49 (holding Idaho statute outlawing "lewd and lascivious" acts on a child was not unconstitutionally vague as applied to defendant where defendant's conduct involved anal intercourse with a child and masturbation with a child).

349. *See id.* at 1348 (holding Idaho statute prohibiting "lewd and lascivious" acts on a child did not impinge on or chill any constitutionally protected conduct, so that defendant convicted of this offense could not attack statute "on its face, but only as applied to his conduct"); *see also* Holland v. Tacoma, 954 P.2d 290, 293-96 (Wash. Ct. App. 1998) (holding complainant's action barring enforcement of ordinance, which limited volume of sound projected from car sound system, involved conduct not associated with First Amendment expression and, as such, ordinance was not vulnerable to a facial challenge; furthermore, ordinance had "clear guidelines," in that a person of ordinary intelligence would know what it means for sound to be "audible" at more than 50 feet away and, therefore, was not vague as applied).

350. Chapman v. United States, 500 U.S. 453, 467 (1991) (holding what constitutes a "mixture or substance" containing LSD as proscribed in federal narcotics offense was not vague).

351. Johnson v. Athens-Clarke County, 529 S.E.2d 613, 615-16 (Ga. 2000) (holding municipal "loitering or prowling" ordinance vague as applied).

352. *Schwartzmiller*, 752 F.2d at 1348.

interpretations thereof, "provided sufficient notice, under the circumstances of [the particular] case, [such] that a person in [the defendant's] situation would know whether his conduct was criminal."[353] Thus, even if the statute could be considered vague "as applied" to some activity, if the defendant's conduct in the case at bar was clearly within the limits of the statute, that defendant cannot sustain an "as applied" vagueness challenge.[354]

For example, in the case of *Davis v. State*,[355] the Indiana Court of Appeals considered an "as applied" challenge to a statute that prohibited neglect of a dependent.[356] The defendants were convicted of violating this child neglect statute by abandoning their child, who was only a few hours old, by the side of a gravel road in rural Indiana.[357] The defendants challenged the "places the dependent in a situation that *may endanger* his life or limb" language, stating that the statute failed to explicitly inform the public and law enforcement officers of the specific conduct that was prohibited.[358] They argued that the statute was so broad that it could be said parents who allow their child to "engage in interscholastic and contact sports 'may endanger' the child's life or health."[359]

In reviewing the statute, the appellate court stated that it was "well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand."[360] The court noted that in a vagueness "as applied" challenge, defendants are not permitted to devise a hypothetical situation which would demonstrate vagueness.[361] Rather, the court emphasized that the question to be analyzed in a vagueness challenge is "whether an individual of ordinary intelligence would reasonably understand that *his contemplated conduct* is proscribed."[362] Here, the court held that "[n]o reasonable person of ordinary intelligence" would have difficulty determining that abandoning a child that is only a few hours old along the side of a gravel road constituted a violation of a statute that prohibited the "neglect" of a dependent.[363]

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353. *Johnson*, 529 S.E.2d at 615.

354. *See* Davis v. State, 476 N.E.2d 127, 130-31 (Ind. Ct. App. 1985).

355. 476 N.E.2d 127.

356. *Id.* at 130 n.1 ("A person having the care, custody, or control of a dependent who knowingly or intentionally: (1) places the dependent in a situation that may endanger his life or health; (2) abandons or cruelly confines the dependent; (3) deprives the dependent of necessary support; or (4) deprives the dependent of education as required by law; commits neglect of a dependent." (quoting IND. CODE ANN. § 35-46-1-4 (Michie 1979))).

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.* (quoting United States v. Mazurie, 419 U.S. 544, 550 (1975)).

361. *Id.* at 130-31.

362. *Id.* at 131 (emphasis added) (citing *Mazurie*, 419 U.S. at 553).

363. *Id.* at 130-31.

Where an individual engages in conduct without any reasonable realization that it falls within the reach of a legal prohibition, that person may succeed with an *as applied* challenge.[364] In *Shuttlesworth v. City of Birmingham*,[365] the United States Supreme Court reviewed the conviction of a defendant who had been found guilty of violating (1) a municipal ordinance which made it an offense for any person who (a) was blocking free passage on a sidewalk, or (b) was standing or loitering on a sidewalk, to fail to heed a police request to move on;[366] and (2) another ordinance that made it an offense for any person to refuse or fail to comply with a police order.[367] According to the prosecution, the defendant was observed by a police officer on a sidewalk with ten or twelve companions outside a department store, whereupon the officer approached the group and told them to clear the sidewalk.[368] "After some, but not all, of the group" dispersed, the defendant asked the officer, "You mean to say we can't stand here on the sidewalk?"[369] After repeating the request, during which time everyone but the defendant began walking off, the officer arrested defendant.[370]

In its review, the Court noted that the first ordinance the defendant had allegedly violated actually contained two strictures: one prohibiting *obstructing free passage* on a sidewalk and another prohibiting *standing or loitering* on a sidewalk.[371] The Court found that the Alabama Court of Appeals had given this ordinance a limiting construction in a separate unrelated case, to-wit, that the second stricture only restricted standing or loitering that obstructed free passage, but that such construction had been provided only *after* the defendant had been charged and convicted under the ordinance.[372] Given the Alabama appellate court construction, while also considering the fact that the Alabama trial judge did not have the benefit of this judicial narrowing of the statute while deciding the defendant's fate, the Court ruled, "As so construed, we cannot say that the

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364. *See, e.g.*, Palmer v. City of Euclid, 402 U.S. 544, 544-46 (1971) (explaining municipal "suspicious person" ordinance vague as applied).

365. 382 U.S. 87 (1965).

366. *Shuttlesworth*, 382 U.S. at 88 ("It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on." (quoting BIRMINGHAM, ALA., GENERAL CITY CODE § 1142 (1944))).

367. *Id.* ("It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer." (quoting BIRMINGHAM, ALA., GENERAL CITY CODE § 1231 (1944))).

368. *Id.* at 89.

369. *Id.*

370. *Id.*

371. *Id.* at 90 (citing BIRMINGHAM, ALA., GENERAL CITY CODE § 1142 (1944)).

372. *Id.* at 91-92 (citing Middlebrooks v. City of Birmingham, 170 So. 2d 424, 426 (Ala. App. Ct. 1964)).

ordinance is unconstitutional, though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied."[373] Further, because the Court was "unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construction," the Court decided it had no choice but to reverse defendant's conviction on the first ordinance charge.[374]

As to the second count of the complaint, the Court noted that the underlying ordinance on its face simply made it illegal "to refuse or fail to comply with any lawful order, signal or direction of a police officer."[375] Standing alone, said the Court, "the literal terms of this ordinance are so broad as to evoke constitutional doubts of the utmost gravity."[376] Nevertheless, like the first ordinance, it too had been given a limiting instruction, namely, the refusal had to be in conjunction with a police order *directing vehicular traffic*.[377] As such, it became clear that the ordinance could *not* be applied to the defendant.[378] The arresting officer was not directing traffic when he asked the defendant to move on, and the defendant was a pedestrian, "not in, on, or around any vehicle at the time he was directed to move on or at the time he was arrested."[379]

In *Watts v. United States*,[380] the Court ruled that although a federal statute that made "criminal a form of pure speech" was constitutional on its face, it was not applicable to a defendant who had been convicted for a violation of the statute.[381] In this case, the defendant had been charged with the felony offense of "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States."[382] At a public rally on the grounds of the Washington Monument, the defendant mentioned to several individuals present that he was eligible to be drafted into the military and that he had received his notice to report for his physical examination the following Monday morning.[383] The defendant then added, "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," referring to then President Lyndon Johnson.[384] At trial, the defendant's counsel moved for judgment of acquittal, while insisting the defendant's

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373. *Id.* at 91.
374. *Id.* at 92.
375. *Id.* at 93 (quoting BIRMINGHAM, ALA., GENERAL CITY CODE § 1231 (1944)).
376. *Id.*
377. *Id.* (citing Phifer v. City of Birmingham, 160 So. 2d 898, 901 (Ala. Ct. App. 1963)).
378. *Id.* at 93-94.
379. *Id.* at 95.
380. 394 U.S. 705 (1969) (per curiam).
381. *Watts*, 394 U.S. at 707, 708. It is not clear if the Court was examining the statute against a vagueness claim. *See id.* at 712 (Fortas, J., dissenting) ("The Court holds . . . that this statute is constitutional and that it is here wrongly applied.").
382. *Id.* at 706 (alteration in original) (citing 18 U.S.C. § 871(a) (1948)).
383. *Id.* at 705-06.
384. *Id.* at 706.

comments did not amount to a threat to the life of the President.[385] In its review of the defendant's conviction, the Court first examined the statute itself. The Court stated that this statute was "[c]ertainly" constitutional, given the nation's "overwhelming interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence," but nevertheless it had to "be interpreted with the commands of the First Amendment clearly in mind."[386] In the opinion of the Court, this statute could only apply to speech if the government proved the existence of a "true 'threat.'"[387] The Court did "not believe that the kind of political hyperbole indulged in by petitioner fit within that statutory term."[388] Given the "expressly conditional nature of the statement," this law could not reasonably be deemed applicable to the defendant's utterance.[389]

IV. APPROACHES DESIGNED TO PROVIDE NOTICE AND ENFORCEMENT STANDARDS

There exist mechanisms that *may* assure the citizenry has adequate notice of what a criminal prohibition outlaws. These will be explored at this juncture.

A. Listing Prohibited Items and Conduct

One way to ensure that citizens are provided adequate notice of what is proscribed by a particular statute is to provide a *list* of what items or activities are prohibited.[390] This approach is typically followed in instances where a statute proscribes items that may have the potential for both legitimate and illegitimate uses. One example of the use of the listing approach is the Illinois Drug Paraphernalia Control Act.[391] The Act defines "drug paraphernalia" as follows:

> "Drug paraphernalia" means all equipment, products and materials of any kind which are peculiar to and marketed for use in planting,

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385. *Id.* at 706-07.

386. *Id.* at 707.

387. *Id.* at 708.

388. *Id.*

389. *Id.*

390. *See, e.g.*, United States v. Kairouz, 751 F.2d 467, 468 (1st Cir. 1985) (where defendant claimed he did not realize he possessed heroin because he thought it was cocaine, court responded "both cocaine and heroin are controlled substances within the meaning of schedules I and II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. *See* 21 U.S.C. § 812(c) sched. I (b)(10) (*listing* heroin as a controlled substance)." (emphasis added)). This is not suggesting the failure to list proscribed items or conduct invariably leads to a finding of vagueness. *See, e.g.*, Ward v. Illinois, 431 U.S. 767, 781 (1977) (rejecting claim that Illinois obscenity statute is necessarily vague because it failed to include "exhaustive list" of type of sexual acts that are outlawed by the act).

391. 720 ILL. COMP. STAT. 600/1-/7 (2002).

> propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body cannabis or a controlled substance in violation of the "Cannabis Control Act" or the "Illinois Controlled Substances Act" . . . . It includes, but is not limited to:
>
> (1) Kits peculiar to and marketed for use in manufacturing, compounding, converting, producing, processing or preparing cannabis or a controlled substance;
>
> (2) Isomerization devices peculiar to and marketed for use in increasing the potency of any species of plant which is cannabis or a controlled substance;
>
> (3) Testing equipment peculiar to and marketed for private home use in identifying or in analyzing the strength, effectiveness or purity of cannabis or controlled substances;
>
> (4) Diluents and adulterants peculiar to and marketed for cutting cannabis or a controlled substance by private persons;
>
> (5) Objects peculiar to and marketed for use in ingesting, inhaling, or otherwise introducing cannabis, cocaine, hashish, or hashish oil into the human body including, where applicable, the following items:
>
> (A) water pipes;
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> (B) carburetion tubes and devices;
>
> (C) smoking and carburetion masks;
>
> (D) miniature cocaine spoons and cocaine vials;
>
> (E) carburetor pipes;
>
> (F) electric pipes;
>
> (G) air-driven pipes;
>
> (H) chillums;
>
> (I) bongs;
>
> (J) ice pipes or chillers;
>
> (6) Any item whose purpose, as announced or described by the seller, is for use in violation of this Act.[392]

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392. *Id.* at 600/2(d).

Following the enactment of the Illinois Drug Paraphernalia statute, it was challenged as unconstitutionally vague in the case of *Adams Apple Distributing Co. v. Zagel*.[393] In *Adams Apple*, the Illinois Appellate Court found that the enactment, which fully defined what constituted *drug paraphernalia* "in six ways and *specifically list[ed]* 10 items that [had] been determined to constitute drug paraphernalia," provided adequate notice to those subject to the law and, as such, was not unconstitutionally vague.[394]

An example of legislation that has relied on the "listing" of *activity* to avoid a vagueness attack is child pornography. *New York v. Ferber*,[395] discussed at length above,[396] relied in part on this approach in upholding New York's child pornography prohibition.[397] Inasmuch as any legislation outlawing distribution of visual materials, including portrayals of children engaged in sexual activity, would have to withstand a First Amendment challenge, it was necessary that such legislation be written in a manner that clearly delineated that activity which was proscribed. Realizing that a depiction, for example, of a baby in his or her birthday suit could never be sanctioned, the New York legislature described in precise, if not graphic, detail what was contemplated: a "sexual performance" involving a child below the age of 16 engaged in "sexual conduct," with the latter being defined as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals."[398] In analyzing the legislation, the Court commented that "[t]he forbidden acts to be depicted are *listed* with sufficient precision" that one could not seriously assert lack of notice of what activity involving children was included.[399]

B. Inclusion of Mens Rea

Sometimes a statute, which may otherwise be void-for-vagueness, may survive a vagueness challenge because of the statute's inclusion of a *mens rea* element.[400] For example, in the earlier mentioned case of

393. 501 N.E.2d 302, 304 (Ill. App. Ct. 1986).

394. *Adams Apple*, 501 N.E.2d at 305 (emphasis added) (referring to ILL. REV. STAT. ch. 56 1/2, para. 2102 (1985), subsequently codified at 720 ILL. COMP. STAT. 600/2 (2002)). It should be noted that in *People v. Monroe* the Illinois Supreme Court ruled that while the definition section of the statute which specified what constituted "drug paraphernalia" was satisfactory, the "penalty" section that permitted a conviction where a person had no actual knowledge that that which he was selling was drug paraphernalia was unconstitutional in that it lacked a necessary scienter. People v. Monroe, 515 N.E.2d 42, 43-45 (Ill. 1987).

395. 458 U.S. 747 (1982).

396. *See supra* notes 272-93 and accompanying text.

397. *Ferber*, 458 U.S. at 765.

398. *Id.* at 750 (quoting N.Y. PENAL LAW §§ 263.00(1), 263.00(3) (McKinney 1980)).

399. *Id.* at 765 (emphasis added).

400. *See, e.g.*, Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 502 (1982) (upholding municipal drug paraphernalia ordinance); United States v. Nat'l Dairy Prods.

United States v. Gaudreau,[401] the United States Court of Appeals for the Tenth Circuit considered the validity of a Colorado commercial bribery statute when used as a component of a federal prosecution under the Racketeer Influenced Corrupt Organizations Act (RICO).[402] The Colo-

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Corp., 372 U.S. 29, 34-35 (1963) (holding federal Robinson-Patman Act making it a crime to sell goods at "unreasonably low prices *for the purpose of destroying or eliminating competition*" was not vague; element of "predatory intent" required by Act "provides further definition of the prohibited conduct"); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342 (1952) (holding federal regulation requiring truckers to avoid "congested thoroughfares" and the like when transporting explosive substances was not vague, because "statute punishes only those who knowingly violate the Regulation"); Screws v. United States, 325 U.S. 91, 103-04 (1945) (plurality opinion) (holding federal law which prohibits, under color of law, the "willful" deprivation of a citizen's federal constitutional or other legal rights was not vague given construction that the word "willful" means government must establish accused had the specific intent to deprive a person of a federal right); Hygrade Provision Co., Inc. v. Sherman, 266 U.S. 497, 502 (1925) (holding that a "specific intent to defraud," saved an otherwise vague statute which outlawed sale of meat falsely represented to be "kosher"); United States v. Collins, 272 F.3d 984, 989 (7th Cir. 2001) (holding, because of scienter requirement in federal controlled substances legislation, the defendant "bears an especially heavy burden in raising his vagueness challenge" (quoting United States v. Cherry, 938 F.2d 748, 754 (7th Cir. 1991))); United States v. Biro, 143 F.3d 1421, 1428 (11th Cir. 1998) (holding "[w]e are persuaded that an ordinary person would understand" a federal statute prohibiting a person from "selling a device to a customer designed by the manufacturer primarily for the purpose of the surreptitious interception of communications," where the statute explicitly requires proof that accused sent or sold such a device "*knowing or having reason to know that the design* of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communication"); Poole v. Wood, 45 F.3d 246, 249 (8th Cir. 1995) (holding Minnesota statutes proscribing sexual contact or sexual penetration accomplished by means of a false representation was not vague, because statutes required element of false representation and sexual contact is defined as being "committed with sexual or aggressive intent"), *cert. denied*, 515 U.S. 1134 (1995); Comm. in Solidarity with the People of El Salvador v. FBI, 770 F.2d 468, 476 (5th Cir. 1985) (holding statute which made it a crime to coerce, threaten, intimidate, harass, or obstruct certain foreign officials or their guests was not vague because all proscribed acts had to be carried out "willfully"); Murphy v. Matheson, 742 F.2d 564, 573-74 (10th Cir. 1984) (holding Utah drug paraphernalia law that required proof of vendors' *intent* to market an item they *know* to be drug paraphernalia not vague); M.S. News Co. v. Casado, 721 F.2d 1281, 1290 (10th Cir. 1983) (holding Wichita ordinance outlawing promotion of sexually orientated materials to minors was not vague where distributor must *know* the content of the material and its nature and character); United States v. Salazar, 720 F.2d 1482, 1485-86 (10th Cir. 1983) (holding federal offense of acquisition and unlawful possession of food stamps was not vague where statute requires proof of scienter), *cert. denied*, 469 U.S. 1110 (1983); Levas & Levas v. Antioch, 684 F.2d 446, 452-54 (7th Cir. 1982) (holding municipal drug paraphernalia ordinance was not vague in view of "intent requirement"); City of Chicago v. Powell, 735 N.E.2d 119, 130 (Ill. App. Ct. 2000) (holding municipal ordinance outlawing "soliciting unlawful business" was not vague where ordinance required proof of *purposeful* solicitation); Byrum v. Texas, 762 S.W.2d 685, 688 (Tex. Ct. App. 1988) (holding Texas crime of public lewdness by sexual contact was not vague because law requires "a specific culpable mental state, a factor which tends to defeat a vagueness challenge"); *cf.* Colautti v. Franklin, 439 U.S. 379, 390 (1979) (holding Pennsylvania Abortion Control Act which required physician's preservation of life of fetus where fetus "may be viable" was vague because it subjected physician to criminal liability without regard to fault; the ambiguous viability-determination requirement "is aggravated by the absence of a scienter requirement").

401. 860 F.2d 357 (10th Cir. 1988); *see supra* notes 317-322 and accompanying text.

402. *Gaudreau*, 860 F.2d at 358 ("A person commits a class 6 felony if he solicits, accepts, or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as: (a) Agent or employee; or . . . (d) Officer . . . of an incorporated association." (quoting COLO. REV. STAT § 18-5-401(1)(a), (d) (1986))).

rado statute at issue prohibited soliciting or accepting money "as consideration for knowingly violating or agreeing to violate a duty of fidelity."[403] In this case, the defendants were indicted for violation of RICO, which was based in part on violation of the Colorado statute for agreeing to accept money in exchange for awarding Public Service Company of Colorado contracts to certain suppliers.[404] The defendants were charged with conspiracy to violate the statute by enticing a public service executive named Oscar Lee to violate his duty of fidelity to the public service corporation.[405] The defendants moved to dismiss the indictment on the grounds that the Colorado statute was unconstitutionally vague in regards to what constituted a breach of a "duty of fidelity."[406] The defendants argued that "the statute did not give them fair notice that their conduct was prohibited because they could have discovered that Mr. Lee's duty of loyalty forbade him from taking bribes only by consulting cases, other statutes and treatises."[407] The defendants also argued that "while the statute may give notice to an ordinary lawyer, it does not give notice to an ordinary layman."[408] The federal district court had held that the challenged sections of the Colorado commercial bribery statute were void for vagueness, both facially and as applied in this case and, therefore, dismissed the indictments under this statute.[409] The government then appealed to the Tenth Circuit, which addressed the issues of whether the statute was both facially vague and vague as applied in this case.[410] The Tenth Circuit quickly dismissed the facial vagueness challenge as inappropriate.[411] The court noted that there are only two instances when a facial vagueness challenge is permissible.[412] The first occurs where an enactment "threatens to chill constitutionally protected conduct," and the second arises when the statute is being challenged in a declaratory judgment action requesting pre-enforcement review.[413] Neither of these situations were applicable in this instance.[414] The court then turned to the vagueness as applied challenge to the statute.[415] The court determined that the statute provided adequate notice to those who were subject to the statute because the statute had a "*scienter* requirement."[416] The court

403. *Id.* (citing COLO. REV. STAT. § 18-5-401(1) (1986)).
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.* at 362.
408. *Id.*
409. *Id.* at 359.
410. *Id.*
411. *Id.* at 361.
412. *Id.* at 360.
413. *Id.* at 360-61.
414. *Id.* at 361.
415. *Id.*
416. *Id.* at 363.

noted that the statute prohibited "*knowingly* violating or agreeing to violate a duty of fidelity."[417] The court held that the "type of *scienter* which the prosecution must prove [was] precisely the type that overcomes the objection that the Colorado statute may punish without fair warning to the accused."[418] The court interpreted the statute to require that "the prosecution . . . prove beyond a reasonable doubt that [the defendant] knew his duty of fidelity and knew he was violating it."[419] Because the defendant must have actually known of the duty of fidelity that he was inducing another to violate, the court held that the statute provided adequate notice of what was proscribed and, therefore, the statute was not void for vagueness.[420]

In *People v. Monroe*,[421] the *absence* of a satisfactory *mens rea* element spelled doom for a state drug paraphernalia prohibition.[422] In this case, the Illinois Supreme Court noted that the Illinois drug paraphernalia law contained two distinct sections: a "definition" provision and a "penalty" provision.[423] The definitional language, which appears in the previous section of this paper,[424] specified that "drug paraphernalia" meant any devices or materials which are "peculiar to and marketed for use" in connection with illicit drug activity.[425] Meanwhile, the penalty language prohibited commercial sale of such items where a vendor "knows, *or under all of the circumstances reasonably should have known*" he was marketing drug paraphernalia.[426] The court observed that the language in the definitional section was very similar to that contained in the municipal drug paraphernalia ordinance that was approved by the United States Supreme Court in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[427] discussed earlier.[428] In *Flipside*, the Court had ruled the "designed or marketed for use with illegal cannabis or drugs" language in the Hoffman Estates ordinance encompassed a *scienter* requirement inasmuch as "a retailer could scarcely 'market' items 'for' a particular use without intending that use."[429] The Illinois Supreme Court pointed out that the *Flipside* decision relied heavily on the principle that *scienter*

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417. *Id.* (emphasis added) (citing COLO. REV. STAT. § 18-5-401(1) (1986)).
418. *Id.* at 363.
419. *Id.*
420. *Id.*
421. 515 N.E.2d 42 (Ill. 1987).
422. *See Monroe*, 515 N.E.2d at 42.
423. *Id.* at 43.
424. *See supra* note 394 and accompanying text.
425. *Monroe*, 515 N.E.2d at 43 (quoting ILL. REV. STAT. ch. 56 1/2, para. 2102 (1985), subsequently codified as 720 ILL. COMP. STAT. 600/2 (2002)).
426. *Id.* (quoting ILL. REV. STAT. ch. 56 1/2, para. 2103, subsequently codified as 720 ILL. COMP. STAT. 600/3 (2002)).
427. 455 U.S. 489 (1982).
428. *See supra* notes 262-71, 323-44 and accompanying text.
429. *Monroe*, 515 N.E.2d at 43-44 (quoting *Vill. of Hoffman Estates*, 455 U.S. at 502).

may "mitigate a law's vagueness."[430] Although the definitional section of the Illinois statute posed no problem in the mind of the Illinois Court, it was troubled by the language in the penalty section that would base a conviction on the fact that a vendor "reasonably should have known" he was dealing in drug paraphernalia.[431] This meant a conviction would rest on "constructive knowledge" rather than actual knowledge, a proposition, the court concluded, which forced it to rule the penalty section unconstitutionally vague for failing to confer "fair notice."[432] *Monroe*, then, illustrates how lack of *scienter* may trigger a finding of vagueness.

New York v. Ferber,[433] discussed earlier,[434] is an illustration of the United States Supreme Court's apparent insistence that a law that carries the potential of somehow limiting First Amendment protections *must* contain a criminal *mens rea*.[435] In that case, the Court commented in its review of the state child pornography stricture, "[a]s with obscenity laws, criminal responsibility [for child pornography] may not be imposed without some element of *scienter* on the part of the defendant."[436] After noting that the statute at issue "expressly includes a *scienter* requirement," the Court ruled that the proscription passed constitutional muster.[437]

It must be understood that a penal enactment that *does* include a *mens rea* element will not necessarily survive a vagueness challenge. In *Kramer v. Price*,[438] the United States Court of Appeals for the Fifth Circuit entertained a vagueness challenge to a Texas harassment statute.[439] This legal dispute arose out of the defendant's mailing of a postcard to a man with whom she previously lived, who had later married another woman and subsequently become the father of the latter woman's child.[440] The post card read, "Baby Problem Solved," followed by an advertisement regarding a child burial vault.[441] Following the defendant's prosecution and conviction for violation of the state harassment law, the Fifth Circuit in a *habeas corpus* challenge considered the Texas statute,

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430. *Id.* at 44 (quoting *Vill. of Hoffman Estates*, 455 U.S. at 499).

431. *Id.* at 44-45.

432. *Id.* at 45.

433. 458 U.S. 747 (1982).

434. *See supra* notes 272-93, 395-99 and accompanying text.

435. *See Ferber*, 458 U.S. at 764-65.

436. *Id.* at 765.

437. *Id.*

438. 712 F. 2d 174 (5th Cir. 1983), *aff'd on other grounds on reh'g*, 723 F.2d 1164 (5th Cir. 1984) (en banc).

439. *Kramer*, 712 F.2d at 176 ("A person commits an offense if he intentionally . . . communicates by telephone or in writing in vulgar, profane, obscene, or indecent language or in a coarse and offensive manner and by this action intentionally, knowingly, or recklessly annoys or alarms the recipient." (quoting TEX. PENAL CODE ANN. § 42.07 (Vernon 1983))).

440. *Id.* at 175.

441. *Id.*

which made it illegal to "annoy" or "alarm" another by some written or telephone communication, terms which the defendant claimed were vague.[442] The State of Texas argued that the statute's requirement of intent defused the vagueness assertion.[443] The Fifth Circuit first noted that the Texas courts had never made an "attempt to construe the terms 'annoy' and 'alarm' in a manner which lessens their inherent vagueness."[444] Further, the Texas courts had "refused to construe the statute to indicate whose sensibilities must be offended."[445] Thus, even though the statute mandated proof of *intentional* annoyance or alarm, it was not clear what "underlying conduct" was proscribed by these two words and, as such, the statute was deemed vague.[446]

V. SOURCES OF NOTICE AND ENFORCEMENT STANDARDS

As discussed above, vagueness can arise in two situations: (1) uncertainty as to whom a statute applies and (2) uncertainty as to what conduct the statute proscribes, that is, whether the statute provides an ascertainable standard of guilt. A reviewing court will ordinarily resort to every reasonable construction in order to declare the statute constitutional and defeat the vagueness challenge.[447] As the United States Supreme Court stated in *Winters v. New York*:[448]

> This Court goes far to uphold state statutes [and federal statutes] that deal with offenses, difficult to define, when they are not entwined with limitations on free expression. . . . Only a definite conviction by a majority of this Court that the conviction violates the Fourteenth Amendment justifies reversal of the court primarily charged with responsibility to protect persons from conviction under a vague state statute.[449]

In contrast, if a statute is ambiguous, the court will normally apply the rule of strict construction, giving the defendant the benefit of the doubt, to ascertain the meaning of questionable statutory language.[450] However,

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442. *Id.* at 176.

443. *Id.*

444. *Id.* at 178.

445. *Id.*

446. *Id.* at 177-78 (emphasis added).

447. Winters v. New York, 333 U.S. 507, 517-18 (1948).

448. 333 U.S. 507 (1948); *see supra* notes 63-74 and accompanying text for the earlier discussion of this case.

449. *Winters*, 333 U.S. at 517.

450. *See, e.g.*, Rewis v. United States, 401 U.S. 808, 812 (1971) (resolving in the defendants' favor statutory ambiguity as to whether federal Travel Act applied to defendants who ran a lottery frequented by out-of-state visitors but where there was no showing that defendants themselves crossed state line to commit an offense); United States v. Bass, 404 U.S. 336, 347-48 (1971) (holding, where ambiguity existed raising questions as to whether prohibition against a felon's receipt, possession or transportation of a firearm in interstate commerce is to be interpreted in a manner whereby government must establish *receiving* and *possessing* as well as *transporting* be in interstate commerce, rule of lenity so required such proof).

as stated earlier, many jurisdictions reject this doctrine of strict construction, with courts often avoiding it by simply finding that the statutory uncertainty does not involve an ambiguity.[451] Thus, the courts tend to give considerable deference to the legislature in an effort to uphold the laws the people have created. In order to accomplish this goal, courts resort to various measures to declare that a statute provided notice to the citizenry regarding what a law prohibits. In effect, the courts look to various sources for guidance as to the meaning of various words, phrases, and other language contained in the statutes being challenged. These interpretive aids vary widely from referencing common law, plain language, dictionaries, and even the Bible. The courts routinely implement various techniques to find that the citizenry enjoyed a workable definition of what was outlawed by the stricture. In many cases, a court will look to numerous sources to demonstrate that the defendant had adequate notice. For example, in *Muscarello v. United States*,[452] the United States Supreme Court was faced with the question of whether having a firearm in the glove box or the trunk of a car during the commission of a drug offense constituted "carrying a firearm."[453] The Court looked to the plain language of the statute,[454] five different dictionaries,[455] the Bible,[456] several works of literature,[457] previous decisions by the Court using the word "carry,"[458] newspapers,[459] and legislative history[460] in order to finally determine that having a gun in one's glove

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451. *See supra* notes 198-208 and accompanying text.

452. 524 U.S. 125 (1998). This decision does not explicitly address a vagueness claim. However, the analysis the Court used was similar to that it would have utilized had it encountered such a challenge.

453. *Muscarello*, 524 U.S. at 126 (referring to 18 U.S.C. § 924(c)(1) (1997), which imposes a five-year mandatory prison term upon anyone who "uses or carries a firearm" during an illegal drug transaction). Since the accused was *not* actively *using* the weapon at the time, the issue was whether he was "carrying" a weapon during the commission of the offense. *Id.* at 127-28.

454. *Id.*

455. *Id.* at 128 (citing 2 OXFORD ENGLISH DICTIONARY 919 (2d ed. 1989); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 343 (1986); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 319 (2d ed. 1987); BARNHART DICTIONARY OF ETYMOLOGY 146 (1988); OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 148 (C. Onions ed., 1966)).

456. *Id.* at 129 (citing 2 *Kings* 9:28; *Isaiah* 30:6).

457. *Id.* (citing DANIEL DEFOE, ROBINSON CRUSOE 174 (J. Crowley ed., 1972); HERMAN MELVILLE, MOBY DICK 43 (U. Chi. Press 1952)).

458. *Id.* (citing California v. Acevedo, 500 U.S. 565, 572-73 (1991); Florida v. Jimeno, 500 U.S. 248, 249 (1991)).

459. *Id.* The Court conducted a search of the *New York Times* database in Lexis/Nexis and the "US News" database in Westlaw looking for articles in which the words "carry," "vehicle," and "weapon" all appeared. *Id.* The Court concluded that nearly one third of the articles found used the word "carry" to mean "the carrying of guns in a car." *Id.*

460. *Id.* at 132.

compartment or trunk did constitute "carrying" a firearm within the meaning of the statute.[461]

It is also important to note that the particular source or concern that the reviewing court places the most emphasis on, quite often, will determine the outcome of the ruling.[462] For example, in *Keeler v. Superior Court*,[463] the California Supreme Court faced the question of whether the death of a fetus constitutes a murder.[464] The majority opinion focused most of its attention on the *common law* definition of murder and of a "human being" in order to determine that a fetus was not a "human being" within the meaning of the statute.[465] The dissent, on the other hand, focused mainly on the *purpose* of the law, that is, to prevent killing.[466] The dissent concluded that the purpose or "fair import" of the statute was best fulfilled by applying the statute to all deaths, including the death of a viable fetus.[467] This smorgasbord approach to vagueness analysis contributes to what some see as the reality that "courts' construction of criminal statutes is typically ad hoc, sacrificing broader legal principles for the sake of a desired result in a particular case."[468] In any event, the remainder of this section will discuss the variety of those sources and guidelines to which courts routinely look to address a void-for-vagueness challenge, ambiguity, or other indefinite legislation. It should be noted that in some instances, a case will be examined which did not explicitly involve a vagueness challenge or ambiguity, but which reflects a court's struggle as it decides the meaning of somewhat nebulous language in a criminal law. These latter cases involving statutory uncertainty are nevertheless useful in understanding the resolution of vagueness and ambiguity arguments in that the court's analysis often closely resembles the analysis it would utilize if it was addressing such an issue.

A. Common Usage of Terms

Often, courts simply look to the common usage of terms or language to decipher the meaning of a criminal statute.[469] Judicial opinions

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461. It should be noted the majority refused to apply the rule of lenity because it saw no "grievous ambiguity." *Id.* at 138-39. *But see id.* at 148 (Ginsberg, J., dissenting) (arguing statute was sufficiently ambiguous to apply rule of lenity).

462. *See, e.g.*, Keeler v. Superior Court of Amador County, 470 P.2d 617, 618 (Cal. 1970).

463. Keeler, 470 P.2d at 618.

464. *Id.* at 618.

465. *Id.* at 619-30.

466. *Id.* at 630 (Burke, J., dissenting).

467. *Id.* at 634 (Burke, J., dissenting).

468. Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 39 (1997).

469. *See, e.g*, Chapman v. United States, 500 US 453, 462 (1991) (holding that the words "mixture" and "substance" as used in federal statute outlawing distribution of a "mixture or substance" containing LSD was not vague given "ordinary meaning" of the words); Rose v. Locke, 423 U.S. 48, 50 (1975) (holding the phrase "crimes against nature," as outlawed by Tennessee

routinely state that "when a statute contains language with an ordinary and popularly understood meaning, courts will assume that this is the meaning intended by the legislature."[470] For example, in *Bailey v. United States*,[471] the United States Supreme Court considered the word "use" in connection with a drug trafficking charge.[472] Specifically, two different defendants had been convicted of a federal drug offense that carried enhanced penalties where the perpetrator "during and in relation to any . . . drug trafficking crime . . . use[s] or carries a firearm."[473] The first defendant, upon his arrest following a traffic stop, was found to have a substantial amount of cocaine, as well as a loaded 9-mm. pistol in the trunk of his car.[474] The second defendant, after selling drugs in her apartment to an undercover officer, was found to have additional drugs and a .22-caliber pistol in a locked trunk in her bedroom.[475] Both offenders were convicted of the more serious trafficking charges on the theory that they had "used" their firearms "in relation" to their illicit drug activity.[476]

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statute, was not vague in that "[t]he phrase has been in use among English-speaking people for many centuries"); Grayned v. City of Rockford, 408 U.S. 104, 112 (1972) (holding municipal anti-noise ordinance barring noise which "disturbs" adjacent school was not vague because the ordinance "clearly 'delineates its reach in words of common understanding'" (quoting Cameron v. Johnson, 390 U.S. 611, 616 (1968))); United States v. Harriss, 347 U.S. 612, 620, 624 (1954) (holding the term "lobbying' as used in Federal Regulation of Lobbying Act "should be construed to refer only to 'lobbying in its commonly accepted sense'" and that statute satisfied constitutional requirement of "definiteness"))); United States v Gaudreau, 860 F.2d 357, 363 (10th Cir. 1988) ("The statute prohibits bribery, a concept well-understood by the ordinary person."); Comm. in Solidarity with People of El Salvador v. FBI, 770 F.2d 468, 477 (5th Cir. 1985) (holding federal statute prohibiting intentional threatening, harassing or intimidating foreign officials or their guests was not vague, because "[i]t is not necessary for the lawmaker . . . to define words in common usage if the statute use them according to their everyday meaning" (quoting Kramer v. Price, 712 F.2d 174, 179 (5th Cir. 1983))); People v. Bailey, 657 N.E.2d 953, 962 (Ill. 1995) (holding state anti-stalking statute, which prevents "following" victim plus directing threats to the victim, was not vague and "[i]n absence of a statutory definition, courts will assume that statutory words have their ordinary and popularly understood meanings"); People v. Reynolds, 689 N.E.2d 335, 342 (Ill. App. Ct. 1997) (holding aggravated criminal sexual assault stricture that outlawed a person from taking advantage of his "position of trust, authority, or supervision" by having sexual contact with a minor was not vague; statute reliant on "plain language"); State v. Fisher, 631 P.2d 239, 246 (Kan. 1981) (holding statute outlawing "endangering a child" was not vague considering "commonsense reading of the statute"); Commonwealth v. Cass, 467 N.E.2d 1324, 1325 (Mass. 1994) (holding, after determining the "ordinary meaning" of the word "person" is synonymous with "human being," vehicular homicide statute was not vague because it lent itself to conclusion that a fetus was a "person" within the vehicular homicide prohibition); City of Mankato v. Fetchenhier, 363 N.W. 2d 76, 79 (Minn. Ct. App. 1985) (holding statute outlawing "lewd" and "indecent" conduct was not vague because "[t]hese terms . . . have a reliable and sufficiently definite meaning to the ordinary citizen").

470. People v. Haywood, 515 N.E.2d 45, 51 (1987) (holding phrase "bodily harm," used in offense of aggravated criminal sexual assault, was not vague).

471. 516 U.S. 137 (1995).

472. *Bailey*, 516 U.S. at 138-39.

473. *Id.* (quoting 18 U.S.C. § 924(c)(1) (1997)).

474. *Id.*

475. *Id.* at 140.

476. *Id.* at 139-41.

In its review of these cases, the Court stated, "We start, as we must, with the language of the statute."[477] Here, "[t]he word 'use' . . . must be given its 'ordinary or natural meaning.'"[478] Noting that this word carried definitions in earlier judicial opinions as well as ordinary dictionaries which "imply action and implementation"[479] and "connote activity beyond simple possession,"[480] the Court observed that neither of the defendants had *actively* used their firearms in relation to their drug trafficking and, as such, their convictions could not stand.[481]

Another decision from the Court centered on the definition of the commonly used word "carry." In *Muscarello v. United States*,[482] which was mentioned earlier,[483] the issue before the United States Supreme Court was whether the phrase "'carries a firearm' is limited to the carrying of firearms on the person."[484] This issue arose from two independent cases, consolidated together for analysis. In the first case, defendant Muscarello unlawfully sold marijuana from his truck.[485] Upon arrest, law enforcement officers searched the defendant's truck and found a handgun locked in the glove compartment.[486] This defendant argued that the federal statute with which he was charged, which carried an enhanced penalty if the drug trafficker was carrying a firearm, did not apply to his having the gun in the glove compartment of his vehicle.[487] In the second case, two other defendants "placed several guns in a bag, put the bag in the trunk of their car, and then . . . [drove] to a proposed drug-sale point, where they intended to steal drugs from their sellers."[488] Federal agents at the scene where the drug transaction was to occur stopped the two defendants, searched the car, and found the guns and drugs.[489] All three defendants appealed their respective convictions, arguing that they had not "carried" guns within the meaning of the statute.

The United States Supreme Court began its examination of the phrase "carries a firearm" by considering the statutory language itself.[490]

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477. *Id.* at 144.

478. *Id.* at 145 (quoting Smith v. United States, 508 U.S. 223, 228 (1993)).

479. *Id.*

480. *Id.* (quoting United States v. McFadden, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, C.J., dissenting)).

481. *Id.* at 148-51.

482. 524 U.S. 125 (1998).

483. *See supra* notes 452-61 and accompanying text.

484. *Muscarello*, 524 U.S. at 126.

485. *Id.* at 127.

486. *Id.*

487. *Id.* at 125-27; *see also* 18 U.S.C. § 924(c)(1) (1997) (mandating a five-year prison term for any person who "uses or carries" a firearm during and in relation to a drug trafficking crime).

488. *Muscarello*, 524 U.S. at 127.

489. *Id.*

490. *Id.* at 126-28.

The Court noted that the word "carry" had two meanings relevant to the issue at hand.[491]

> When one uses the word in the first, or primary, meaning, one can, as a matter of ordinary English, "carry firearms" in a wagon, car, truck, or other vehicle that one accompanies. When one uses the word in a different, rather special, way, to mean, for example, "bearing," or (in slang) "packing" (as in "packing a gun"), the matter is less clear. . . . [W]e believe Congress intended to use the word in its primary sense and not in this latter, special way.[492]

The Court deferred to the ordinary English language usage of the word "carries," while operating on the premise that Congress intended the word "to convey its ordinary, and not some special legal, meaning."[493] In answering the "purely legal question of whether Congress intended to use the word 'carry' in its ordinary sense, or whether it intended to limit the scope of the phrase to instances in which a gun [was] carried 'on the person,'"[494] the Court looked to the statute's "basic purpose," which they surmised was to "combat the 'dangerous combination' of 'drugs and guns.'"[495] The Court stated that it would not make sense for the statute:

> to penalize one who walks with a gun in a bag to the site of a drug sale, but to ignore a similar individual who . . . travels to a similar site with a similar gun in a similar bag, but instead of walking, drives there with the gun in his car.[496]

Thus, the Court concluded that the "'generally accepted contemporary meaning' of the word 'carry' include[d] the carrying of a firearm in a vehicle."[497] The Court then affirmed the lower courts' decisions that each of the defendants' conduct fell within the scope of the enactment.[498]

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491. *Id.* at 128.

492. *Id.*

493. *Id.* at 128-29 (The Court referred to various dictionaries to define the word "carry." The Court noted that the *OXFORD ENGLISH DICTIONARY* defines carry as "convey, originally by cart or wagon, hence in any vehicle, by ship or horseback, etc." (quoting OXFORD ENGLISH DICTIONARY 919 (2d ed. 1989)). The *King James Bible* uses the word "carry," finding passages such as, "[H]is Servants carried him in a chariot to Jerusalem." (quoting 2 *Kings* 9:28 (King James)). The Court also noted the use of the word in literature including its use in *ROBINSON CRUSOE*: "[w]ith my boat, I carry'd away every Thing." (quoting DANIEL DEFOE, ROBINSON CRUSOE 174 (J. Crowley ed. 1972)). The Court also looked to its previous decisions, acknowledging that "[t]his Court, too, has spoken of the 'carrying' of drugs in a car or in its 'trunk.'" (citing California v. Acevedo, 500 U.S. 565, 572-73 (1993); Florida v. Jimeno, 500 U.S. 248, 249 (1991))).

494. *Id.* at 132.

495. *Id.* (quoting *Smith*, 508 U.S. at 240).

496. *Id.* at 133.

497. *Id.* at 139.

498. *Id.*

Another example of reliance on the common usage of terms appeared in *United States v. Powell*,[499] in which the defendant challenged a statute that made it a crime to knowingly mail "firearms capable of being concealed on the person."[500] Following her conviction for violation of this offense arising out of the mailing of a sawed-off shotgun, the defendant argued that the "firearms capable of being concealed on the person" terminology was vague and therefore unconstitutional.[501] The [United States] Court of Appeals for the Ninth Circuit questioned whether the "person" referred to in the statute was to be "the person mailing the firearm, the person receiving the firearm, or perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate whatever the season."[502] Unclear about the statute's meaning, the Ninth Circuit found it vague.[503] However, the United States Supreme Court disagreed with the Ninth Circuit's ruling and instead attributed to Congress the "commonsense meaning that such a person would be an average person garbed in a manner to aid, rather than hinder, concealment of the weapons."[504] The Court stated that "[s]uch straining to inject doubt as to the meaning of the words where no doubt would be felt by the normal reader is not required by the 'void for vagueness' doctrine, and we will not indulge in it."[505] The Court, therefore, reversed the appellate decision by the simple process of examining the common meaning of the statutory language at issue.[506]

Coates v. City of Cincinnati,[507] another United States Supreme Court decision, is an example where a *lack* of a common meaning that might be ascribed to a specific term undermined a particular criminal statute. In *Coates*, the defendants were convicted of violating a Cincinnati ordinance which made it a crime "for three or more persons to assemble . . . on any of the sidewalks. . . and there conduct themselves in a manner annoying to persons passing by."[508] The issue before the Court was whether the statute was unconstitutional because it was unclear as to what constituted "annoying" conduct.[509] Prior to the Court's review, the Ohio Supreme Court had stated that "[t]he word 'annoying' is a widely used and well understood word; it is not necessary to guess its mean-

499. 423 U.S. 87 (1975).
500. *Powell*, 423 U.S. at 89 (quoting 18 U.S.C. § 1715 (1970)).
501. *Id.* at 89-90.
502. *Id.* at 93 (quoting United States v. Powell, 501 F.2d 1136, 1137 (9th Cir. 1974)).
503. *Id.* at 88.
504. *Id.* at 93.
505. *Id.*
506. *Id.* at 94.
507. 402 U.S. 611 (1971).
508. *Coates*, 402 U.S. at 611 (quoting CINCINNATI, OH., CODE OF ORDINANCES § 901-L6 (1956)).
509. *Id.* at 613.

ing."[510] Therefore, the Ohio Supreme Court concluded that the ordinance "clearly and precisely delineates its reach in words of common understanding."[511] However, the United States Supreme Court determined that although "annoying" was a commonly used word, the statute was unconstitutionally vague because it did not indicate upon "whose sensitivity a violation does depend – the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man."[512] The Court noted, for example, that a reading of the statute might lead to the conclusion that where individuals might "meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who happens to pass by."[513] Considering this and other possible inappropriate applications, the Court found the statute to be "unconstitutionally vague because it subjecte[d] . . . [individuals' right to freedom] of assembly to an unascertainable standard."[514] The Court further stated that the ordinance was vague not because "it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."[515]

Bailey, *Muscarello*, *Powell*, and *Coates* are illustrative of the processes courts employ in reviewing statutes that have been challenged as being vague or uncertain. Clearly, a court presumes the validity of a state or federal criminal statute.[516] Thus, in an effort to uphold a statute, the court will apply common understanding or commonsense usage of terms and assume a person of common intelligence could understand the meaning of the statute and the conduct it prohibits. As one court said, "It cannot be presumed that the [legislature], in legislating, intended obscurity, or 'to override common sense.'"[517]

B. Common Understanding Within a Discrete Group

Sometimes, a court in attempting to determine the precise meaning of a statute will look to the way that a term or phrase is commonly understood in a discrete group, trade, profession, or geographical area.[518]

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510. *Id.* at 612 (quoting City of Cincinnati v. Coates, 255 N.E.2d 247, 249 (Ohio 1970)).

511. *Id.* at 613 (quoting *Coates*, 255 N.E.2d at 249).

512. *Id.*

513. *Id.* at 614.

514. *Id.*

515. *Id.*

516. *See* Screws v. United States, 325 U.S. 91, 98 (1945) (plurality opinion) (presuming validity of federal statute); *see also* People v. Haywood, 515 N.E.2d 45, 49 (Ill. 1987) (presuming validity of state statute).

517. *Haywood*, 515 N.E.2d at 48 (quoting United States v. Brown, 333 U.S. 18, 25 (1948)).

518. *See, e.g.*, Connelly v. General Const. Co., 269 U.S. 385, 391 (1926) (discussing decisions of the court that have upheld statutes as not vague which include those "rested upon the conclusion that the employed word or phrases have a technical or other special meaning, well enough known to

Obviously, many criminal statutes are directed at certain conduct in which only a fraction of the general population engages and, as such, these statutes are in reality targeted at specific groups of people. Thus, the question becomes whether affected persons within such a group understood the meaning of certain statutory language. For example, in *Omaechevarria v. Idaho*,[519] the United States Supreme Court examined such a law. Here, the territorial legislature had passed in 1875 the Two Mile Limit Law to "avert clashes between sheep herdsmen and cattle farmers" because the "cattle [would] not graze . . . [or] thrive on ranges where sheep were allowed to graze extensively."[520] Specifically, the Two Mile Limit Law prohibited "any person having charge of sheep from allowing the sheep to graze on a range previously occupied by cattle."[521] Thus, the Two Mile Limit law was enacted by the legislature to protect the cattle farmers and their industry from the sheep herdsmen's behavior of permitting their sheep to destroy those pastures that would otherwise be suitable for cattle grazing.

In *Omaechevarria*, the criminal statute was challenged on Fourteenth Amendment indefiniteness grounds in that it failed to identify the particular boundaries or ranges that were off limits to the sheep herdsmen and also failed to identify a time frame for which the lands were off limits.[522] The United States Supreme Court relied on what could be described as the "common understanding within a discrete group" approach in upholding the Two Mile Limit Law. The Court held that the statute was not vague or indefinite because "men familiar with range conditions and desirous of observing the law [would] have little difficulty in determining what is prohibited by [the statute]."[523] Here, the law pertained to two groups of individuals, sheep herdsmen and cattle farmers. Thus, individuals involved in sheep herding or cattle farming would understand the type of conduct prohibited by the law. The fact that

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enable whose within their reach to correctly apply them"); *see also* Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 502 (1982) (holding that the business co-operator's admission that he sold "roach clips," commonly associated with cannabis consumption, belied his argument that he had no notice of what constituted "drug paraphernalia" outlawed by municipal ordinance); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502 (1925) (holding that New York law prohibiting sale of meat falsely represented to be "kosher" was not vague because "the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it"); United States v. Easter, 981 F.2d 1549, 1558 (10th Cir. 1992) (stating that "[w]hen Congress has used technical or terms of art, the term must be given its technical or scientific meaning," and here, what constitutes cocaine "base" is not vague). *But see Winters*, 333 U.S. at 519 (holding that state "obscene prints and articles" law punishing dissemination of certain materials carried no "technical . . . meaning" that might have put vendors on notice as to what law prohibited).

519. 246 U.S. 343 (1918).

520. *Omaechevarria*, 246 U.S. at 344-45.

521. *Id.* at 345.

522. *Id.* at 348.

523. *Id.*

a person outside the sheep herding or cattle farming industry would not understand the law or how it applies has no bearing as to whether the law is constitutional because the law targets conduct of particular individuals for a particular purpose within a particular situation. Anyone in the particular industry would commonly understand the meaning of the Two Mile Limit Law. Furthermore, "[s]imilar expressions [that pertain to a particular group or groups] are common in criminal statutes of other states."[524] Therefore, the Court upheld the Two Mile Limit Law.[525]

Meanwhile, in *Connally v. General Construction Co.*,[526] the United States Supreme Court examined a criminal statute in Oklahoma that prohibited a government employer from paying his or her employees "less than the current rate of per diem wages in the locality."[527] In this case, certain state and county officials brought an action to prevent enforcement of this act on the theory that the standard specified in the statute was vague. When the matter reached the Court, it ruled that while statutes employing language having "technical or other special meaning" would be upheld if "those within their reach" would have understood the language at issue,[528] this legislation did not meet that standard.[529] First, "current rate of wages" lacked an ascertainable meaning in that it was unclear as to whether this language meant the minimum, the maximum, or some other intermediate amount, such as the average.[530] Second, it was unclear as to what was meant by "locality."[531] Here, the Court likened the term of that of a "neighborhood," which carries different meanings to different people.[532] Thus, the *absence* of any special understanding of the statute's terminology by those directly affected by the law resulted in the Court finding the statute void for uncertainty.

C. Dictionary Definitions

Frequently, a court examining statutory vagueness, ambiguity, or uncertainty will look to a common dictionary to determine the meaning of words in a statute.[533] In *Chapman v. United States*,[534] a United States

524. *Id.*
525. *Id.*
526. 269 U.S. 385 (1926).
527. *Connally*, 269 U.S. at 388 (quoting OKLA. COMP. STAT. § 7255 (1921)).
528. *Id.* at 391.
529. *Id.* at 393-95.
530. *Id.* at 394.
531. *Id.* at 394-95.
532. *Id.* at 395.
533. *See, e.g.*, *Muscarello*, 524 U.S. at 128 (referring to several dictionaries to determine the meaning of the word "carry"); *Village of Hoffman Estates*, 455 U.S. at 501 (looking to dictionary to decipher the meaning of the word "design," as used in municipal drug paraphernalia ordinance which outlawed devices "designed" for use in connection with consumption of illicit drugs); Gooding v. Wilson, 405 U.S. 518, 525 (1972) (referring to the dictionary to determine what constitutes "fighting words" while finding Georgia breach of the peace statute vague and overbroad);

Supreme Court opinion, the defendants had been convicted in federal court for distribution of LSD. The statute under which they were convicted carried enhanced penalties if the offense involved more than one gram of a "mixture or substance containing [a] detectable amount" of LSD.[535] The defendants challenged the "mixture or substance" language as ambiguous.[536] They contended the "blotter paper" that was impregnated with the LSD could not be included in calculating the weight of the illicit drug.[537] However, after consideration of the dictionary definition of "mixture,"[538] the Court concluded that the statutory language reached the situation at issue in this case; namely, the blending of the chemical LSD into the blotter or carrier paper entitled the paper to be included in the calculated weight.[539] Thus, the dictionary proved to be a useful source in establishing that the statutory language was neither ambiguous nor vague.[540]

Meanwhile, in some cases, referencing a dictionary may offer a definition that belies the government's claim that a statute clearly applies to certain conduct. For instance, in the case of *State v. Blowers*,[541] decided by the Utah Supreme Court, the defendant was charged with driving under the influence of alcohol in violation of Utah law.[542] This statute

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Kramer v. Price, 712 F.2d 174, 177 (5th Cir. 1983) (considering that the dictionary definition of the word "annoy" leads to the conclusion that the meaning of this word which appears in Texas harassment law was so broad that it did *not* delineate what type of conduct was proscribed), *aff'd on other grounds on reh'g*, 723 F.2d 1164 (5th Cir. 1984) (en banc); People v. Bailey, 657 N.E.2d 953, 962-63 (Ill. 1995) (referring to dictionary to determine the meaning to "follow" and "to further" within the Illinois stalking law which was determined not to be vague); People v. Nitz, 747 N.E.2d 38, 47 (Ill. App. Ct. 2001) (citing People v. La Pointe, 431 N.E.2d 344, 353 (Ill. 1981) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1050 (1971), in effort to determine meaning of "heinous" and "brutal" conduct as used in Illinois natural life imprisonment sentencing law)); People v. Selby, 698 N.E.2d 1102, 1108 (Ill. App. Ct. 1998) (examining dictionary definition of word "socializing" where defendants, Illinois Department of Correction employees, claimed "official misconduct" charges were invalid because charges were based on allegations they had engaged in sexual intercourse with inmates contrary to prison regulation barring employee socializing with inmates); People v. Reynolds, 689 N.E.2d 335, 340-42 (Ill. App. Ct. 1997) (referring to dictionary to determine the proper meaning of "trust," "authority," and "supervision," where aggravated criminal assault conviction was predicated on defendant's taking advantage of his superior position with minor); People v. Higginbotham, 686 N.E.2d 720, 722 (Ill. App. Ct. 1997) (looking to the dictionary in order to determine whether the defendant's conduct amounting to illegally "touching" as outlawed in aggravated criminal sexual abuse statute); Davis v. State, 476 N.E.2d 127, 130 n.3 (Ind. Ct. App. 1985) (referring to the dictionary in order to determine meaning of "endanger" contained in child neglect statute).

534. 500 U.S. 453 (1991).

535. *Chapman*, 500 U.S. at 456-57 (quoting 21 U. S. C. § 841 (b)(1) (1988)).

536. *Id.* at 458.

537. *Id.* at 456.

538. *Id.* at 462 (referring to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 921 (2d. ed. 1989)).

539. *Id.* at 462-63.

540. *Id.* at 461-68.

541. 717 P.2d 1321 (Utah 1986).

542. *Blowers*, 717 P.2d at 1322 (citing UTAH CODE ANN. § 41-6-44(1) (1953)).

provided that "it is unlawful . . . for any person with a blood alcohol content of .08% or greater . . . to drive or be in actual physical control of a vehicle within the state."[543] In this particular case, when the defendant was arrested, he was not driving a motor vehicle, instead, he was riding a horse.[544] Therefore, the issue in this case was whether a horse could be considered a "vehicle" as defined in another Utah statute. "Vehicle" was defined in another Utah statute as "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway."[545] After examining that definition, the question the court asked was whether a horse could be considered a "device" as it was meant in the statute.[546] The court noted that "[n]o dictionary we have examined defines 'device' to encompass an animal."[547] As such, the court concluded that the due process requirement of fair notice precluded the court from torturing the definition of a "vehicle" to include a horse.[548]

In some instances, the courts may resort to numerous dictionaries in an attempt to ascertain a consensus of meanings.[549] This was the case in *Lanzetta v. New Jersey*,[550] where the United States Supreme Court considered the constitutionality of a statute making it illegal to be a "gangster."[551] A New Jersey statute stated as follows:

> Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster.[552]

The defendant had been charged with violating this statute and, upon conviction, he challenged the conviction by arguing that the statute violated his right to due process because it was vague and uncertain.[553] Specifically, the defendant challenged the usage of the word "gang" in the statute.[554] In attempting to determine the meaning of the word gang, the Court looked to several dictionaries.[555] Indeed, the Court studied the definitions of the word "gang" from no less than five different dictionar-

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543. *Id.* (quoting UTAH CODE ANN. § 41-6-44 (1) (1953)).
544. *Id.*
545. *Id.* at 1323 (citing UTAH CODE ANN. § 41-6-1(58) (1953)).
546. *Id.*
547. *Id.*
548. *Id.*
549. *See, e.g., Muscarello*, 524 U.S. at 128 (examining five dictionaries in an effort to define "carrying a firearm").
550. 306 U.S. 451 (1939).
551. *Lanzetta*, 306 U.S. at 452.
552. *Id.* (quoting N. J. REV. STAT. 1937, 2:136-4, ch.155, Law (1934)).
553. *Id.*
554. *Id.* at 453-54.
555. *Id.* at 454.

ies.[556] The Court concluded that no clear meaning of the word "gang" could be ascertained from a review of the various dictionaries that were consulted because their definitions varied so widely.[557] In addition, the Court looked to other potential sources, such as common law and various historical and sociological writings; however, these were also not helpful as to the meaning of the term.[558] The Court concluded that the term "gang," as used in the New Jersey statute, was vague and, therefore, the defendant's conviction was deemed a violation of due process.[559]

D. Common Law

Another source that the courts will look to in order to determine the meaning of a particular statute is the common law.[560] For instance, in *People v. Haywood*,[561] the Illinois Supreme Court examined a vagueness claim arising out of a newly enacted "criminal sexual assault" prohibition that had replaced the jurisdiction's "rape" and "deviate sexual assault" legislation. Specifically, this new offense specified that any sexual penetration accomplished by "force" or the threat of "force" was criminal.[562] The defendants asserted that the word "force," as it appeared in this enactment, could "be construed in its broadest sense possible and include every notion of force imaginable."[563] As such, they argued that the stat-

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556. *Id.* at n.3 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d. ed.); FUNK & WAGNALLS NEW STANDARD DICTIONARY (1915); CENTURY DICTIONARY AND CYCLOPEDIA (1903); OXFORD ENGLISH DICTIONARY (1933); WYLD'S UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1932)).

557. *Id.* at 454.

558. *Id.* at 454-55.

559. *Id.* at 458.

560. *See, e.g.*, Rose v. Locke, 423 U.S. 48, 50 (1975) (looking to the common law and specifically to 4 WILLIAM BLACKSTONE, COMMENTARIES *216, for an understanding of what constitutes a "crime against nature"); *Lanzetta*, 306 U.S. 451 (discussing how common law reflected no definition of what constitutes a "gang," which contributed to defendant's successful vagueness claim); Nash v. United States, 229 U.S. 373, 377 (1913) (looking to the common law to determine what constituted a "conspiracy and combination in restraint of trade" contrary to federal Sherman Act); *Gaudreau*, 860 F.2d at 362 (referring to the common law to determine the meaning of the phrase "duty of fidelity" within the Colorado commercial bribery statute); People v. Haywood, 515 N.E.2d 45, 48 (Ill. 1987) (looking to the common law offense of rape to determine the meaning of the word "force" within the aggravated criminal sexual assault statute); People v. Greer, 402 N.E.2d 203, 207 (Ill. 1980) (looking to the common law to determine whether an eight and one-half-month old fetus constituted an "individual" within the state murder prohibition (citing 3 EDWARD COKE, INSTITUTES *50; 1 WILLIAM BLACKSTONE, COMMENTARIES *129-30; 1 HALE, PLEAS OF THE CROWN 433 (London, T. Payne 1800))); State v. Soto, 378 N.W.2d 625, 628 (Minn. 1985) (utilizing common law rules of construction to determine whether an unborn fetus constituted a "human being" under the Minnesota vehicular homicide statute); Commonwealth v. Cass, 467 N.E.2d 1324, 1326 (Mass. 1984) (looking to the common law to determine whether a fetus can be considered a victim of homicide and concluding that it could; therefore, viable fetus was considered a "person" for purposes of vehicular homicide statute).

561. 515 N.E.2d 45 (Ill. 1987).

562. *Haywood*, 515 N.E.2d at 47 (citing ILL. REV. STAT. ch. 38, para. 12-12(d), 12-13(a)(1) (1985)).

563. *Id.* at 48.

ute contained no standard whatsoever in deciphering what constitutes "force" and, consequently, that the legislation had to be ruled vague.[564] However, the Illinois Supreme Court noted the criminal sexual assault measure was designed to replace the offenses of "rape" and "deviant sexual assault," both of which outlawed *forcible* sexual acts.[565] Moreover, the common law of Illinois had developed a clear understanding of what constituted "force" for purposes of these earlier offenses and, in the case at hand, it was quite reasonable to assume the legislature in enacting the new law intended to adopt the earlier meaning of the term unless the legislation indicated otherwise.[566] The court stated, "It is an axiom of statutory construction that a statute alleged to be in derogation of the common law should not be construed as changing the common law beyond what is expressed by the words in the statute or is necessarily implied from it."[567] Here, there was nothing in the language of the act which indicated a new definition of "force" was intended and, thus, the "common law definition of force found in both of the repealed offenses" governed the definition in the new law.[568] Thus, the defendants' claim of vagueness failed.[569]

Meanwhile, the common law may act as a barometer for courts, providing a reading that translates into a conclusion that a criminal charge, given existing legislation, is unwarranted. For example, in *Keeler v. Superior Court of Amador County*,[570] the California Supreme Court considered whether an eight and a-half month fetus constituted a "human being" within the meaning of the California statute defining murder.[571] In this case, the defendant attacked and physically assaulted his wife while a final divorce decree was pending. Realizing she was visibly pregnant by another man, he kneed her in the stomach, while saying, "I'm going to stomp it out of you."[572] Her fetus was later delivered stillborn.[573] Thereafter, the defendant was charged with the murder of the fetus.[574] Prior to trial, the defendant sought a writ of prohibition seeking to have the charge of murder dismissed on the theory that the death of a fetus did not constitute the death of a "human being" and, as such, could not give rise to murder.[575] A pathologist testified at a preliminary examination that the

564. *Id.*
565. *Id.* at 49 (citing ILL. REV. STAT. ch. 38, para. 11-1, 11-3 (1983) (repealed)).
566. *Id.* at 48-49.
567. *Id.* at 49.
568. *Id.* at 50.
569. *Id.*
570. 470 P.2d 617 (Cal. 1970).
571. *Keeler*, 470 P.2d at 618 (citing CAL. PENAL CODE § 187 (West 1970)).
572. *Id.*
573. *Id.*
574. *Id.* at 619.
575. *Id.*

cause of death of the fetus was a skull fracture and cerebral hemorrhaging resulting from "force applied to the mother's abdomen."[576] In reviewing the defendant's petition for a writ of prohibition, the California Supreme Court looked to the history of California's murder statute and determined that it contained the same language as did the original California statute defining murder in 1850, when California first became a state.[577] The court noted that the legislature in 1850 enacted its murder statute containing the same language as was typical of common law murder prohibitions.[578] After concluding that the 1850 murder statute should be interpreted consistently with the state of the common law at that time, it found that the common law understanding of murder was that an infant could not be the subject of homicide unless it had been born alive.[579] Also, the court pointed out that various other states had made it an offense to kill a fetus; however, these offenses were classified as either "feticide," "abortion," or "manslaughter," but not "murder."[580] The court then concluded that murder in California was to be defined the same way as it was at common law.[581] As such, the court held that the defendant had been provided no notice that the killing of a fetus, which was not born alive, was contrary to the California statute defining murder and, furthermore, that a judicial enlargement interpreting the statute broadly would be violative of due process.[582]

In contrast, in *Winters v. New York*,[583] a United States Supreme Court decision that was discussed in an earlier section,[584] the *lack* of common law interpretation or definition of certain language in a criminal enactment contributed to the Court's determination that the act was vague. In that case, a New York statute barred dissemination of "obscene prints and articles," which included materials "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime."[585] The New York Court of Appeals had given this enactment a narrowing construction, namely, that the act only restricted such materials that were "so massed as to become vehicles for inciting violent and depraved crimes against the per-

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576. *Id.* at 618.

577. *Id.* at 619.

578. *Id.*

579. *Id.* at 620. The court looked to Lord Coke's Third Institutes, which asserted that abortion was "murder only if the [fetus] is (1) quickened, (2) born alive, (3) lives for a brief interval, and (4) then dies." *Id.* (quoting 3 EDWARD COKE, INSTITUTES *58 (1648)). The court also cited Blackstone and Hale to reiterate Coke's position. *Id.* at n.6 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *129-30; 1 HALE, PLEAS OF THE CROWN 433 (London, T. Payne 1778)).

580. *Keeler*, 470 P.2d at 621.

581. *Id.* at 622-24.

582. *Id.* at 630.

583. 333 U. S. 507 (1948).

584. *See supra* notes 63-74, 448-49 and accompanying text.

585. *Winters*, 333 U. S. at 508 (quoting N.Y. PENAL LAW, CONSOL. LAWS, ch. 40, § 1141(2) (McKinney 1945)).

son."[586] Notwithstanding this judicial gloss designed to save the statute from a claim of vagueness, the United States Supreme Court ruled the reach of the statute was "too uncertain and indefinite to justify the conviction of this petitioner."[587] Among other concerns articulated by the Court, this criminal ban carried no "common law meaning" or history from which it might be possible to glean a more precise understanding of (1) what was forbidden and (2) if it avoided unconstitutional restrictions on First Amendment rights.[588] Here, the Court was limited to examining the language of the statute itself and the single New York judicial construction of it, which standing alone was insufficient to survive the petitioner's challenge.

E. Obvious Policy Considerations

Often, a reviewing court will consider the *obvious policy* behind a statute in order to determine the meaning of a particular portion of a statute.[589] As one court observed, a "court should consider not only the language of the statute but also the reason and necessity for the law, the evils to be remedied and the objects and purposes to be obtained."[590] For example, in the case of *McLaughlin v. United States*,[591] the United States

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586. *Id.* at 518-519 (quoting People v. Winters, 63 N.E.2d 98, 100 (N.Y. 1945)).

587. *Id.* at 519.

588. *Id.*

589. *See, e.g.*, United States v. Powell, 423 U.S. 87, 91 (1975) (holding statute proscribing the mailing of pistols, revolvers and "other firearms capable of being concealed on the person" was not vague as applied to a 22-inch sawed-off shotgun; "[t]o narrow the meaning of the language Congress used so as to limit it only to those weapons which could be concealed as readily as pistols or revolvers would not comport with [the] . . . purpose" of making "it more difficult for criminals to obtain concealable weapons"); Grayned v. City of Rockford, 408 U.S. 104 (1972) (deciding that municipal anti-noise ordinance that restricts noise which has the capacity to "disturb" adjacent school not vague because "it is apparent from the statute's announced purpose that the [scope of] the measure is [limited to] whether normal school activity has been or is about to be disrupted"); People v. Bailey, 657 N.E.2d 953, 960-61 (Ill. 1995) (holding that anti-stalking laws not vague for failure to include language that perpetrator "without lawful authority" (1) followed or placed victim under surveillance and (2) made threats against victim; here, proscription could not be said to encompass innocent conduct inasmuch as purpose of the statutory scheme was limited to "goal of protecting possible victims of stalking and aggravated stalking"); *Haywood*, 515 N.E.2d at 49 (explaining that inasmuch as "the central purpose of the [newly enacted Criminal Sexual Assault Act] was to recodify the sexual offenses into a comprehensive statute with uniform statutory elements that would criminalize all sexual assaults without distinguishing between the sex of the offender or the victim and the type of sexual act proscribed," it was obvious the meaning of the word "force" in the Act should be interpreted in the same manner as it was in the now repealed "rape" and "deviant sexual assault" measures and, as such, the meaning of "force" is not vague); State v. Fisher, 631 P.2d 239, 245-46 (Kan. 1981) (holding that child endangerment statute not vague in scope where "purpose" of Act is to "protect children, and to prevent their being placed where it is reasonably certain injury will result").

590. *Haywood*, 515 N.E.2d at 49 (citing People v. Steppan, 473 N.E.2d 1300, 1303 (1985)); *see also* Bailey v. United States, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word [in a statute] but also its placement and purpose in the statutory scheme.").

591. 476 U.S. 16 (1986).

Supreme Court considered whether an unloaded gun was a "dangerous weapon" within the meaning of the federal bank robbery statute.[592] The defendant and his companion entered a bank in Baltimore wearing gloves and stocking masks.[593] While displaying a handgun, defendant ordered everyone at the bank to put their hands up and not to move.[594] Meanwhile, the defendant's companion "vaulted the counter and placed about $3,400 in a brown paper bag."[595] As the two left the bank they were apprehended by police, who determined that the defendant's gun was not loaded.[596] Following his prosecution and conviction, the defendant appealed, arguing that an unloaded gun could not be considered "a dangerous weapon."[597] However, the United States Supreme Court cited three reasons why an unloaded gun could be considered a dangerous weapon:

> First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.[598]

Based on these considerations, the Court ruled that an unloaded gun is a "dangerous weapon" for purpose of this statute.[599]

McLaughlin represents an excellent example of a strong policy consideration that resolves the meaning of somewhat nebulous statutory language. Central to law enforcement concerns is the aspect of deterrence. In connection with a robbery, it is certainly appropriate to penalize the unlawful taking of property of another through threat of force—the robbery—and to punish to an even greater extent a robbery with a dangerous weapon. Obviously, *McLaughlin* recognized that the introduction of what *appears* to be a dangerous weapon will make the robbery victim more compliant with the robber's demands and invite a greater level of possible danger to innocent persons, such as where a bank security guard feels clearly justified in using deadly force against the gun-wielding assailant, with the unhappy result that an innocent bank patron is shot instead. Then, of course, there is the possibility of a robbery victim being "pistol whipped." Obviously the robbery brings its own danger—the apparent weapon even more. Finally, to rule otherwise would place the

592. *McLaughlin*, 476 U.S. at 16 (quoting 18 U.S.C. § 2113(d) (1982)).
593. *Id.*
594. *Id.*
595. *Id.*
596. *Id.*
597. *Id.* at 17.
598. *Id.* at 17-18.
599. *Id.* at 18.

law in the strange position of having allowed the robber to instill real fear in his victim, thereby creating for himself a greater prospect of success in his criminal enterprise, while simultaneously immunizing him from liability for the greater offense.

Another example of a court considering the obvious policy rationale behind a statute in order to determine the meaning of a particular portion of a statute is *Commonwealth v. Sexton*,[600] where the Supreme Judicial Court of Massachusetts considered whether concrete pavement could constitute a "dangerous weapon" to support a charge of "assault and battery with a dangerous weapon."[601] In this case, the defendant was charged with "assault and battery with a dangerous weapon" on a joint venture theory after he and his brother attacked a man after leaving a bar.[602] During the attack, the defendant's brother slammed the victim's head against the pavement several times.[603] After being convicted of "assault and battery by means of a dangerous weapon," the defendant appealed his conviction.[604] The appeals court reversed the defendant's conviction holding that a dangerous weapon could only include an object a person could "wield" or "arm" himself with and, as such, "concrete pavement," being a stationary *object*, could not be a "dangerous weapon."[605] The government, thereafter, appealed the reversal to the Supreme Judicial Court of Massachusetts.[606] The court noted that the legislative policy behind the statute was an intent to "invoke greater penalties for assaults which threaten serious injury because an actor chose to employ a dangerous weapon."[607] While some weapons may be *per se* dangerous—devices that are designed and constructed to kill or create great bodily harm—other "innocuous items" may be dangerous based on how they are *used* in a particular case.[608] The court asserted that if an object, including a stationary one, can be used in a way to inflict serious bodily injury, then the object could qualify as a dangerous weapon.[609] The court further reasoned that had the defendant used a broken slab of concrete to bludgeon his victim, that would have been, without question, defined as a dangerous weapon.[610] The court observed that the fact that the concrete was not a broken slab but rather a "fixed thing" did not affect the dan-

600. 680 N.E.2d 23 (Mass. 1997).
601. *Sexton*, 680 N.E.2d at 24.
602. *Id.*
603. *Id.*
604. *Id.*
605. *Id.* at 24-25 (citing Commonwealth v. Sexton, 672 N.E.2d 991 (Mass. App. Ct. 1996)).
606. *Id.* at 24.
607. *Id.* at 25.
608. *Id.*
609. *Id.* at 27.
610. *Id.* at 26.

gerousness of the instrumentality.[611] The court concluded that "an item's dangerous propensities 'often depend[] entirely on its use,' and not its mobility, for '[w]hether the pitcher hits the stone or the stone hits the pitcher, it will be bad for the pitcher.'"[612] Thus, the Supreme Judicial Court of Massachusetts held that a person who uses concrete pavement to intentionally inflict injury on another could be found guilty of assault and battery by means of a "dangerous weapon."[613]

As with *McLaughlin*, the *Sexton* decision correctly focused on the general purpose behind the Massachusetts proscription against assault and battery with a dangerous weapon in concluding the perpetrator had fair notice. Here, the clear policy behind assault and battery strictures is dissuading individuals from injuring or attempting to inflict injury upon another. Introduction of an object that has the capacity to cause even greater injury to an assault victim's life or limb is clearly an element of aggravation. Whether that object was stationary or not is beside the point. Here, the obvious purpose behind the Massachusetts law at issue was discouraging assailants from using an object to create more carnage than would have been the case without it.

Similarly, in *People v. Johnson*,[614] the Court of Appeals of the First District of California had to determine whether transmitting herpes during a rape constituted the infliction of "great bodily injury" upon the victim.[615] In this case, the defendant entered the car the victim was driving "and forced her at knife point to drive" to a deserted street.[616] There, the defendant forced the victim to "kiss him and orally copulate him."[617] The defendant then forcibly removed the victim's pants and raped her.[618] Five days later, the victim was diagnosed with herpes simplex II.[619] At the defendant's trial on charges of kidnapping, rape, oral copulation by force, robbery, and false imprisonment,[620] the jury found the defendant guilty of inflicting "great bodily injury" upon the victim because he had transmitted the herpes virus to the victim.[621] The effect of such a finding resulted in the enhancement of the defendant's sentence.[622] In its review, the California Court of Appeals noted that "great bodily injury" had been defined as a "serious impairment of physical condition" or a "protracted

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611. *Id.*

612. *Id.* at 27 (citing State v. Reed, 790 P.2d 551, 552 (Or. Ct. App. 1990) (quoting MIGUEL DE CERVANTES, DON QUIXOTE, Part II, ch. 43 (John Ormsby trans., William Benton 1952))).

613. *Id.*

614. 225 Cal. Rptr. 251 (Cal. App. 1986).

615. *Johnson*, 225 Cal. Rptr. at 253.

616. *Id.* at 252.

617. *Id.*

618. *Id.*

619. *Id.*

620. *Id.*

621. *Id.* at 253.

622. *Id.* at 252.

impairment of function of any portion of [the] body."[623] The court pointed out that an expert had testified at the defendant's trial that herpes is a venereal disease that cannot be cured by known means.[624] When active, herpes,

> [m]anifests itself in the form of vesicles or tiny blisters in the vaginal area. The principal symptom is intense itching and/or pain, but various complications may arise. These include possible blindness if the virus is accidentally transmitted to the eye and if it gets into the bloodstream, a potential for serious infection involving meningitis, which could result in death.[625]

The expert further testified that the victim was likely to carry the herpes virus for the rest of her life.[626] The court held, therefore, that the transmission of herpes during the rape inflicted "great bodily injury" upon the victim and upheld the jury's decision in that regard.[627] Here, then, this court was considering the obvious policy behind the law, namely, if a perpetrator *hurts his victim in any significant manner*, he ought not be able to avoid liability based on a claim that the nature or type of substantial physical harm he inflicted was not tantamount to great bodily injury.

F. Legislative Intent

Frequently, courts interpret a statute by looking to the legislative intent in enacting the particular statute.[628] The court may ascertain this

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623. *Id.* at 253 (quoting People v. Caudillo, 580 P.2d 274, 290 (Cal. 1978), *overruled on other grounds by* People v. Martinez, 973 P.2d 512 (Cal. 1999)).

624. *Id.*

625. *Id.*

626. *Id.*

627. *Id.*

628. *See, e.g.*, *Muscarello*, 524 U.S. at 132-34 (holding that legislative intent makes clear that language "carries a firearm" is not limited to carrying a firearm on one's person); United States v. Powell, 423 U.S. 87, 91 (1975) (looking to the legislative intent to determine whether a statute which prohibits mailing "firearms capable of being concealed on the person" prohibited mailing sawed off shotguns); United States v. Harriss, 347 U.S. 612, 620-21 (1954) (looking to the legislative history behind the Federal Lobbying Act to determine precisely to whom the statute applies); Screws v. United States, 325 U.S. 91, 98-100 (1945) (plurality opinion) (looking to legislative intent behind federal statute penalizing willful deprivation, under color of law, of an individual's federal right was intended to provide affected citizens broad protection); Robinson v. United States, 324 U.S. 282, 283-84 (1945) (looking to the "scant legislative history" behind a portion of the kidnapping statute that stated that the death sentence shall not be imposed on a person convicted of this offense, which provided that the "kidnapped person has been liberated unharmed," to determine if this proviso applied to the kidnapper who was convicted in the instant case); United States v. Wiltberger, 18 U.S. 76, 95 (1820) (examining the legislative history behind federal law to determine if a homicide that occurred on a river about a half mile wide in the interior of a country constituted "manslaughter at high sea"); Comm. in Solidarity with People of El Salvador v. FBI, 770 F.2d 468, 473 (5th Cir. 1985) ("[T]he legislative history of the statute" which makes it a federal offense to coerce, threaten, intimidate, harass or obstruct certain foreign officials and their guests "makes clear Congress' concern for, and desire to protect rights guaranteed by the First Amendment."); People v. Bailey, 657 N.E.2d 953, 960 (Ill. 1995) (holding claim that state anti-stalking statutes reached innocent

intent by looking to the legislature's exact word selection, in particular the words the legislature chose to use in preference to alternative possibilities,[629] or by looking to the legislative record and the debates that took place when the statute was being considered.[630]

First, a court may simply look at a legislative body's word selection to ascertain congressional intent. For example, in *Bailey v. United States*,[631] which was discussed earlier,[632] the United States Supreme Court considered a federal statute that imposed a five-year minimum term of imprisonment upon a person who "during and in relation to any crime of violence or drug trafficking crime . . . uses or caries a firearm."[633] The question posed to the Court was "whether evidence of the proximity and accessibility of a firearm to drugs or drug proceeds is alone sufficient to support a conviction for 'use' of a firearm during and in relation to a drug trafficking offense" under the statute.[634]

In this case, the defendant was stopped for a traffic violation and when he was asked to step out of the car, the police observed him stuff something between the seat and the front console.[635] A search of the passenger compartment of the car revealed one round of ammunition and 27 plastic bags containing a total of 30 grams of cocaine.[636] After the defendant's arrest, a search of the trunk of the car revealed a gun and a large amount of cash.[637] The defendant was charged with several counts, one of which was drug trafficking while using and carrying a firearm in violation of federal law.[638] At the defendant's trial, an expert testified that drug dealers frequently carry a firearm to protect their drugs and money.[639] Following the defendant's conviction, and on appeal to the United States Supreme Court, the defendant argued that "use" in the statute signified active employment of a firearm.[640] The government insisted

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conduct because statutes did not contain language that proscribed conduct must be "without lawful authority" which does not accord "with the legislature's intent in enacting the statutes to prevent violent attacks by allowing the police to act before the victim was actually injured and to prevent the terror produced by harassing actions"); People v. Greer, 402 N.E.2d 203, 209 (Ill. 1980) (looking to the legislative history of the murder statute to determine whether an eight and one-half-month old fetus constitutes an "individual" within the meaning of the statute); *Sexton*, 680 N.E.2d at 25 (interpreting "dangerous weapons" to include stationary objects, such as concrete pavement, does not contravene intent of legislature).

629. *See, e.g.*, Bailey v. United States, 516 U.S. 137, 146 (1995).
630. *See, e.g.*, United States v. Hernandez-Salazar, 813 F.2d 1126, 1133 (11th Cir. 1987).
631. 516 U.S. 137 (1995).
632. *See supra* notes 471-81 and accompanying text.
633. *Bailey*, 516 U.S. at 138 (citing 18 U.S.C. § 924(c)(1) (1997)).
634. *Id.* at 138-39.
635. *Id.* at 139.
636. *Id.*
637. *Id.*
638. *Id.* (citing 18 U.S.C. § 924(c)(1) (1997)).
639. *Id.*
640. *Id.* at 143.

that "use" in the statute should be interpreted to mean *availing* oneself of a gun.[641] The government argued that an individual violates the statute by putting or keeping the gun in a particular place from which it can be accessed if and when needed to facilitate a drug crime.[642] The Court looked to the word choice used by Congress when it enacted this law to decipher the intent of Congress, concluding that "use" was meant to connote something more than simple possession of a gun.[643] The Court stated that if Congress had "intended possession alone to trigger liability under [the statute], it easily could have so provided."[644] The Court noted that in many other gun-related statutes, Congress had used the term "possess," therefore, the fact that Congress chose to employ the word "use" rather than "possess" in this instance was significant.[645] The Court concluded that a broad definition of the word "use," which could be "satisfied in almost every case by evidence of mere possession[,] does not adhere to the obvious congressional intent to require more than possession to trigger the statute's application."[646]

Second, beyond simply focusing on the legislature's word choice, which itself may reflect the legislature's intent, a court may be required to dig deeper and look to the legislative history *behind* the statute to determine its meaning. For example, in *United States v. Hernandez-Salazar*,[647] the United States Court of Appeals for the Eleventh Circuit considered an amendment to a federal statute that dealt with currency reporting violations.[648] Specifically, this amendment expanded the authority of U.S. Customs officers to search persons and property entering and departing the United States for currency reporting violations where an officer had "reasonable cause to believe" a currency violation had occurred.[649] In this case, the defendant was apprehended in the Miami International Airport while attempting to smuggle large amounts of money to Columbia.[650] The defendant challenged the search of his bag-

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641. *Id.* at 141.
642. *Id.* (referring to United States v. Bailey, 36 F.3d 106, 115 (D.C. Cir. 1994) (en banc)).
643. *Id.* at 143.
644. *Id.*
645. *Id.*
646. *Id.* at 144.
647. 813 F.2d 1126 (11th Cir. 1987), *superceded by* 31 U.S.C. § 5317(b) (amended 1986).
648. *Hernandez-Salazar*, 813 F.2d at 1128, 1132 n.23. As amended in 1984, 31 U.S.C. § 5317(b) provided:

> A customs officer may stop and search, without a search warrant, a vehicle, vessel, aircraft, or other conveyance, envelope or other container, or person entering or departing from the United States with respect to which or whom the officer has reasonable cause to believe there is a monetary instrument being transported in violation of [federal currency reporting requirements] of this title.

31 U.S.C. § 5317(b) (1984).
649. *Hernandez-Salazar*, 813 F.2d at 1132 n.23.
650. *Id.* at 1131.

gage as an illegal search contrary to the Fourth Amendment and also challenged the "reasonable cause to believe" language as void-for-vagueness.[651]

In order to rule on the issue regarding the legitimacy of the search, the Eleventh Circuit had to first determine the meaning of "reasonable cause."[652] The defendant claimed that the statute was unconstitutional under the void-for-vagueness doctrine because the statute amounted to an unrestricted delegation of power to Customs officers.[653] In addition, the defendant argued that the phrase "reasonable cause" did not provide a reasonable person with notice of the precise standard of suspicion that authorities needed to conduct the search.[654] Upon review, the court looked to the "legislative history" behind the amendment to determine the meaning of this phrase.[655] The court stated that the legislative history indicated that the section clearly intended to authorize searches on the basis of less than probable cause.[656] Likewise, the court believed that Congress wanted to give Customs officers the ability to perform these warrantless searches in a manner consistent with United States Supreme Court precedent that suggested that "new" Fourth Amendment standards other than "probable cause" and "reasonable suspicion" were disfavored.[657] In doing so, the court deduced that Congress must have intended that the "reasonable cause to believe" standard only required "reasonable suspicion" for such a search because Congress had explicitly stated the standard was to be *less* than "probable cause."[658] Thus, the "reasonable cause" language was not vague.[659] Furthermore, the statute did authorize a search based on reasonable suspicion, rather than probable cause, and because the officers *had* reasonable suspicion to search the defendant in this instance, the defendant's additional challenge that the search was violative of the Fourth Amendment was denied.[660]

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651. *Id.* at 1132.
652. *Id.* at 1133.
653. *Id.* at 1132.
654. *Id.*
655. *Id.* at 1133.
656. *Id.* at 1133 n.28. The court discussed S. REP. NO. 98-225, at 303 (1983), which declared:

> [section 5317(b)'s] on the spot authority of the Customs Service would significantly enhance the effectiveness in monitoring and apprehending persons reasonably believed to be violating the currency reporting provisions of the law. The Committee is fully convinced that such authority is not only needed, but constitutional, under the line of cases holding that warrantless "border searches" are reasonable even without probable cause under the Fourth Amendment.

S. REP. NO. 98-225, at 303 (1983) (alteration in original) (citations omitted).
657. *Hernandez-Salazar*, 813 F.2d at 1133 n.29 (citing United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985)).
658. *Id.* at 1133 n.30 (citing *Montoya de Hernandez*, 473 U.S. at 541).
659. *Id.* at 1133.
660. *Id.* at 1136-39.

G. Prior Judicial Decisions

To determine the meaning of terms in a statute, reviewing courts routinely look to the way the terms have been interpreted in earlier judicial decisions.[661] For example, in *CISPES v. FBI*,[662] the United States Court of Appeals for the Fifth Circuit considered the validity of a statute, designed to protect foreign dignitaries and officials, which held criminally liable anyone who "intimidates, coerces, threatens, or harasses a foreign official or an official guest or obstructs a foreign official in the performance of his duties."[663] The Committee in Solidarity with the People of El Salvador ("CISPES") challenged this statute as both vague and overbroad, arguing that the terms "intimidate," "harass," "coerce," "threaten," and "obstruct" did not sufficiently identify what conduct was prohibited and that it permitted undue discretion on the part of enforcing authorities.[664]

In order to determine the proper meaning of the challenged terms and to decide whether the terms were unconstitutionally vague, the court considered other cases that had upheld those terms against vagueness challenges. First, the court looked to *International Society for Krishna Consciousness v. Eaves*,[665] an earlier decision from the circuit, wherein it had ruled that the terms "coerce" and "obstruct" were not unconstitutionally vague.[666] Next, the court examined *Cameron v. Johnson*,[667] an earlier opinion from the United States Supreme Court, which reflected the proposition that the term "obstruct" as used in a statute prohibiting "picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to or from any . . . courthouse" was not un-

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661. *See, e.g.*, United States v. Sturgis, 48 F.3d 784, 787-88 (4th Cir. 1995) (looking to prior judicial decisions to determine whether an HIV positive inmate's teeth used to bite correctional officers constitute a "deadly weapon"), *cert. denied*, 516 U.S. 833 (1995); Schwartzmiller v. Gardner, 752 F.2d 1341, 1348-49 (9th Cir. 1984) (looking to prior judicial decisions to determine whether the defendant's conduct constituted a "lewd" and "lascivious" sexual acts on a child); People v. Haywood, 515 N.E.2d 45, 49, 51 (Ill. 1987) (looking to prior judicial decisions to determine the meaning of "force" and "bodily harm" for purposes of state criminal sexual assault prohibitions); Commonwealth v. Cass, 467 N.E.2d 1324, 1325-26 (Mass. 1994) (looking to prior judicial decisions to determine whether a fetus constitutes a "person" within the vehicular homicide statute); State v. Soto, 378 N.W.2d 625, 628-29 (Minn. 1985) (looking to prior judicial decisions to determine whether an eight and one-half-month old fetus was a "human being" within the vehicular homicide statute); People v. McCullum, 706 N.Y.S. 2d 616, 617-19 (N.Y. Crim. Ct. 2000) (looking to prior judicial decisions involving inoperable guns to determine whether a can of mace not proved operable could constitute a "dangerous weapon").

662. 770 F.2d 468 (5th Cir. 1985).

663. *Comm. in Solidarity with People of El Salvador*, 770 F.2d at 470-71 n.2 (quoting 18 U.S.C. § 112(b)(1) (1982)). 18 U.S.C. § 112(b)(2) contained similar language which was challenged.

664. *Comm. in Solidarity with People of El Salvador*, 770 F.2d at 475.

665. *Id.* at 476 (citing International Society for Krishna Consciousness v. Eaves, 601 F.2d 809 (5th Cir. 1979)).

666. *Id.* (quoting *Eaves*, 601 F.2d at 831).

667. *Id.* (citing Cameron v. Johnson, 390 U.S. 611 (1968)).

constitutionally vague.[668] Next, the court looked to *Watts v. United States*,[669] another decision from the United States Supreme Court, in which the Court ruled that the term "threaten," as used in a statute outlawing threatening the United States President, was not void for vagueness.[670] Finally, the court considered *Youngdahl v. Rainfair*,[671] wherein the United States Supreme Court had upheld a law prohibiting "intimidating" and "threatening" activities by striking employees.[672] Based on this line of cases, the court determined that the statute as applied to CISPES was not void for vagueness.[673]

In *Greshman v. Peterson*,[674] the United States Court of Appeals for the Seventh Circuit reviewed an Indianapolis city ordinance that barred "aggressive panhandling,"[675] which was defined as including any solicitation of money or other gratuity "in an aggressive manner," including where the panhandling involves (1) "touching" the solicited person, (2) approaching a person waiting in line to be admitted into a commercial establishment, (3) blocking a person's path, (4) following a person, (5) using profane language or a gesture which would cause a reasonable person fear, or (6) a group of two or more panhandlers.[676] The plaintiff, a homeless person, brought an action claiming the ordinance was violative of his First Amendment rights and unconstitutionally vague in violation of the Fourteenth Amendment.[677] After rejecting the First Amendment argument,[678] the Seventh Circuit analyzed the vagueness claim.[679] The court noted that Indiana case law had upheld the state anti-stalking law that bars repeated "harassment" that causes another person to feel threatened.[680] It pointed out its own prior decisions had upheld proscriptions against "threats, extortion, blackmail and the like, 'despite the fact that they criminalize utterances because of their expressive content.'"[681] The Seventh Circuit cited as additional authority a United States Supreme Court decision upholding the constitutionality of a law against "threats" directed at the United States President,[682] followed by another case where

668. *Id.* (quoting *Cameron*, 390 U.S. at 616).
669. *Id.* (citing Watts v. United States, 394 U.S. 705 (1966)).
670. *Id.* (quoting *Watts*, 394 U.S. at 707).
671. *Id.* (citing Youngdahl v. Rainfair, 335 U.S. 131 (1957)).
672. *Id.* (quoting *Youngdahl*, 335 U.S. at 139).
673. *Id.* at 477.
674. 225 F.3d 899 (7th Cir. 2000).
675. *Gresham*, 225 F.3d at 901.
676. *Id.* at 901-02 (quoting INDIANAPOLIS CITY-COUNTY, IND., ORDINANCE NO. 78 (1999); REV. CODE OF INDIANAPOLIS AND MARION COUNTY § 407-102 (1999)).
677. *Id.* at 901.
678. *Id.* at 903-07.
679. *Id.* at 907-09.
680. *Id.* at 908-09 (citing Johnson v. State, 648 N.E.2d 666, 670 (Ind. Ct. App. 1995)).
681. *Id.* at 909 (quoting United States v. Hayward, 6 F.3d 1241, 1259 (7th Cir. 1993) (Flaum, J., concurring), *cert. denied*, 511 U.S. 1004 (1994)).
682. *Id.* (citing *Watts*, 394 U.S. at 707).

the Seventh Circuit itself held that "threats of physical violence" are not protected by the First Amendment.[683] Finally, the court noted another case, decided by the United States Supreme Court, wherein a concurring opinion quoted a law review article stating, "Although the First Amendment broadly protects 'speech,' it does not protect the right to 'fix prices, breach contracts, make false warranties, place bets with bookies, threaten [or] extort.'"[684] Here, the Indianapolis measure could be construed to prohibit any word or gesture that "makes a reasonable person feel they face danger if they refuse to donate" and, as such, could not be enjoined from enforcement.[685]

H. Definitions in Other Statutes Within the Jurisdiction

Sometimes the meaning of a statute can be interpreted by reference or comparison to another statute.[686] First, a court may look to criminal offenses that have previously appeared in the jurisdiction's penal code for instruction as to the meaning of language that is retained in later enactments.[687] Next, a reviewing court may look to other sections of its current criminal code to determine the proper meaning of a term as it is used throughout the code.[688] At other times, a court may look to a statute within the same jurisdiction but outside the penal code to interpret a criminal statute.[689]

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683. *Id.* (citing United States v. Velasquez, 772 F.2d 1348, 1357 (7th Cir. 1985), *cert. denied*, 475 U.S. 1021 (1986))).

684. *Id.* (citing R.A.V. v. St. Paul, 505 U.S. 377, 420 (1992) (Stevens, J., concurring) (quoting Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270 (1981))).

685. *Id.*

686. *See, e.g.*, *Muscarello*, 524 U.S. at 134-39 (examining other federal statutes dealing with guns, including those that refer to "use" of firearm and others that refer to "transporting" a firearm, suggesting Congress intended that language "carries" a firearm in particular federal statute mean not merely carrying on one's person but also in one's automobile); *Bailey*, 516 U.S. at 143 (superceded by statute) (drawing on federal offenses that express themselves in terms of "possesses" guns to conclude that "use" of a gun in federal law connotes active employment and not mere possession); *Comm. in Solidarity with the People of El Salvador*, 770 F.2d at 476-77 (ruling a federal statute outlawing threatening, harassing and intimidating foreign officials not vague; "similar terms have been used and applied in numerous United States statutes"); People v. Greer, 402 N.E.2d 203, 209 (Ill. 1980) (superceded by statute) (discussing a statement in Illinois Abortion law, "killing of a fetus aborted alive may be punished as murder," suggests that killing unborn fetus is not murder).

687. *See, e.g.*, Keeler v. Superior Ct. of Amador County, 470 P.2d 617, 622-24 (Cal. 1970) (superceded by statute) (finding definition of "human being" in current California statute enacted in 1872 was same as prior murder statute enacted in 1850).

688. *See, e.g.*, People v. Davis, 766 N.E.2d 641, 645 (Ill. 2002) (referring to Illinois Air Rifle Act within Criminal Offenses Chapter for definition of "Air Rifle" so as to determine if a pellet gun, which is considered an air rifle under Act, is also a "dangerous weapon" within meaning of Illinois armed violence prohibition).

689. *See, e.g.*, People v. Spencer, 731 N.E.2d 1250, 1251 (Ill. App. Ct. 2000) (referring to Family Law Code definition of "harassment," used for purpose of determining if individual violated an "order of protection," in determining if defendant committed offense of telephone harassment).

In *People v. Haywood*,[690] discussed earlier,[691] the Illinois Supreme Court entertained a vagueness claim directed at certain language contained in prohibitions outlawing criminal sexual assault and aggravated criminal sexual assault, offenses that had replaced Illinois' earlier rape and deviate sexual assault legislation.[692] Specifically, the defendants, in this consolidated appeal, had challenged the word "force" as used in the criminal sexual assault statute and the phrase "bodily harm" as employed in the aggravated criminal sexual assault statute.[693] Regarding the word "force," the court assumed the legislature intended to define the term in essentially the same manner that it had in connection with the recently repealed rape/deviate sexual assault prohibitions that were supplanted by the new, more sophisticated Criminal Sexual Act legislation.[694] Thus, for one to claim lack of notice regarding the meaning of the word "force" was contrary to the "common sense" conclusion that a legislative body, in enacting a new law that relies on existing legal nomenclature, would *not* be intent on the "creation of a new definition" or "obscurity" of existing language.[695]

Meanwhile, regarding the defendants' claim in *Haywood* that the language "bodily harm," as used in the aggravated criminal sexual assault legislation, was vague, the court responded that the phrase "has a well-known legal meaning, and when a statute contains language with an ordinary and popularly understood meaning, courts will assume that that is the meaning intended by the legislature."[696] Here the words "bodily harm" had been earlier defined by the Illinois Supreme Court in the context of the Illinois crime of battery as "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent."[697] Thus, because this language carried a clear meaning elsewhere in the existing Illinois Criminal Code, the defendants could not assert lack of fair notice.[698]

As occurred in *Haywood*, reviewing courts routinely look to other sections of the same statutory scheme to determine the meaning of a particular statute.[699] For example, in *People v. Aguilar*,[700] the Illinois Appel-

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690. 515 N.E.2d 45 (Ill. 1987).

691. *See supra* notes 561-69 and accompanying text.

692. *Haywood*, 515 N.E.2d at 46.

693. *Id.* at 47-48, 51 (referring to language in ILL. REV. STAT. ch. 38, para. 12-13, 12-14 (1985)).

694. *Id.* at 49.

695. *Id.* at 48.

696. *Id.* at 51.

697. *Id.* (quoting People v. Mays, 437 N.E.2d 633, 635-36 (Ill. 1982)).

698. *Id.* at 51-52.

699. *See, e.g.*, *Bailey*, 516 U.S. at 146-47 (superceded by statute) (looking to other parts of the statute leads to the conclusion that "carrying" a firearm does not constitute "use" of a firearm); United States v. Wiltberger, 18 U.S. 76, 94-105 (1820) (looking to the construction of the "whole act" criminalizing felonies on the "high seas" leads to conclusion that homicide on a foreign

late Court looked to the Illinois robbery statute for guidance as it determined the reach of the more recently enacted Illinois "vehicular hijacking" prohibition.[701] In this case, the driver of an automobile stepped out of his van after the defendant hit the driver's van with his foot.[702] After the driver exited his van, the defendant punched the driver in his jaw while defendant's companions threw bottles at him.[703] At this point, the driver fled the scene.[704] When the driver abandoned his van, the defendant and his companions entered the driver's van and drove it away.[705] Following the defendant's apprehension, he was prosecuted and convicted of "vehicular hijacking," which was defined as any taking of a motor vehicle "from the person or the immediate presence of another *by the use of force or by threatening the imminent use of force*."[706] On appeal, defendant argued the vehicle was not taken by force inasmuch as the driver had exited his automobile of his own accord.[707] Also, he claimed the beating of the driver and the bottle-throwing, which precipitated the flight of the driver, were unrelated to any intent to take the vehicle.[708] However, the appellate court noted the vehicular hijacking statute contained language identical in most respects to "robbery," which is defined in Illinois as the taking of property "from the person or presence of another *by the use of force or by threatening the imminent use of force*."[709] Moreover, the robbery statute had been previously interpreted as only requiring "some concurrence between the defendant's threat of force and the taking of the victim's property."[710] In other words, the force or threat of force for purposes of robbery need not immediately precede the taking.[711] To convict one of robbery, it is not necessary to show the force was exerted for the purpose of taking another's property or that the perpetrator formed the intention to take another's property before the force or threat of force occurred.[712] Extrapolating from the robbery stric-

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country's river does not amount to "manslaughter on the high seas"); Columbia Natural Resources v. Tatum, 58 F.3d 1101, 1106-09 (6th Cir. 1995) (consulting the entire federal RICO statute leads to conclusion that the meaning of a "pattern of racketeering activity" is not vague), *cert. denied*, 516 U.S. 1158 (1996); People v. Monroe, 515 N.E.2d 42, 43-46 (Ill. 1987) (holding that *mens rea* provision which appeared in penalty section that conflicts with *mens rea* provision in definitional section of Illinois drug paraphernalia statute renders it vague).

700. 676 N.E.2d 324 (Ill. App. Ct. 1997).
701. *Aguilar*, 676 N.E.2d at 327.
702. *Id.* at 325-26.
703. *Id.* at 326.
704. *Id.*
705. *Id.*
706. *Id.* (quoting 720 ILL. COMP. STAT. 5/18-3(a) (1994)).
707. *Id.*
708. *Id.*
709. *Id.* (quoting 720 ILL. COMP. STAT. 5/18-1(a) (1994)).
710. *Id.*
711. *Id.*
712. *Id.*

ture, the court concluded there existed a concurrence between the defendant's taking of the driver's vehicle and the use of force against him and, as such, the defendant was properly convicted of vehicular hijacking.[713]

As stated, sometimes courts will search *outside* the jurisdiction's *penal code* and find a statutory definition of a word or phrase elsewhere in the jurisdiction's laws in order to demonstrate that the citizenry were sufficiently apprised of the meaning of certain language appearing within the penal code.[714] This occurred in *People v. Calvert*,[715] an Illinois Appellate Court opinion involving a defendant who had been convicted of the offense of "harassment of a witness."[716] The defendant was charged with this Illinois offense after verbally berating a witness in an earlier trial with "language . . . rife with profanity and invective," which caused the witness to cry continuously and to be intimidated and physically shaken.[717] A violation of this offense occurs where a person, "with intent to harass or annoy" another person who had been a witness, defined as a person who had testified in a legal proceeding, "communicates" with such other person "in such manner as to produce mental anguish or emotional distress" or conveys a threat of injury or damage to the individual's person or property.[718] The defendant claimed the evidence was insufficient to establish that he had the requisite intent to harass or annoy and that the statute was overbroad and vague.[719] In its review, the Illinois Appellate Court conceded that the term "harassment" was not defined in the Illinois penal code.[720] However, the court noted that there existed a definition of "harassment" in the Illinois Domestic Violence Act of 1986,[721] which is part of the Family Law chapter of the Illinois code, that was "instructive."[722] Specifically, this definition stated that harassment is: "Knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress . . . ."[723] Accordingly, the court concluded that harassment could arise as "the

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713. *Id.*

714. *See, e.g.*, State v. Dixon, 998 P.2d 544, 549 (Mont. 2000) (referring to MONT. ADMIN. R. 23-7-301 (2002) (Uniform Fire Code) in order to decipher what constitutes possession of "explosive").

715. 629 N.E.2d 1154 (Ill. App. Ct. 1994).

716. *Calvert*, 629 N.E. at 1155 (citing ILL. REV. STAT. ch. 38, para. 32-4a (1991), subsequently codified as 720 ILL. COMP. STAT. 5/32-4a (1993)).

717. *Id.* at 1156.

718. *Id.* (quoting ILL. REV. STAT. ch. 38, para. 32-4a (1991), subsequently codified as 720 ILL. COMP. STAT. 5/32-4a (1993)).

719. *Id.* at 1159.

720. *Id.* at 1157.

721. ILL. REV. STAT. ch. 40, para. 2311-3(6) (1991), subsequently codified as 750 ILL. COMP. STAT. 60/101 (2002)).

722. *Id.*

723. *Id.* (quoting ILL. REV. STAT. ch. 40, para. 2311-3(6) (1991), subsequently codified as 750 ILL. COMP. STAT. 60/103 (1999)).

result of intentional acts which cause another person to be worried, anxious, or uncomfortable and therefore can occur even if there is no overt act of violence."[724] Here, defendant's verbal diatribe, which caused an intense emotional reaction in the victim, and caused her to fear that some type of repercussions might be forthcoming in the future, precluded the defendant's assertion that he had not "harassed" the witness.[725] Thus, the defendant's claims, including his assertion that the entire criminal statute was vague, were rejected and his conviction was affirmed.[726]

I. Definitions From Other Jurisdictions

Yet another source courts facing vagueness claims may look to for guidance are definitions of terms in the law of other jurisdictions.[727] In *Rose v. Locke*,[728] a United States Supreme Court opinion, a defendant had been convicted under a Tennessee statute for committing a "crime against nature."[729] In this case, the defendant entered his female neighbor's apartment on the pretext of using her telephone.[730] Once inside, the defendant produced a knife, forced her to partially undress, "and compelled her to submit to his twice performing cunnilingus upon her."[731] Following the State's successful prosecution of the defendant, the Tennessee trial court sentenced the defendant to five to seven years'

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724. *Id.*

725. *Id.* at 1157-59.

726. *Id.* at 1159-60.

727. *See, e.g.*, People v. Greer, 402 N.E.2d 203, 209 (Ill. 1980) ("After considering the status of the unborn in the common law, *the uniform decisions of the court of last resort in our sister States*, and the attitude toward the unborn reflected in our abortion statute, we conclude that taking the life of a fetus is not murder under our current statute unless the fetus is born alive and subsequently expires as a result of the injuries inflicted." (emphasis added)); State v. Fisher, 631 P.2d 239, 242-45 (Kan. 1981) (deciphering that state statute which outlawed "endangering" a child was not vague by examining similar child endangerment laws and their interpretation in Colorado, California, New Mexico, and Pennsylvania); State v. Soto, 378 N.W.2d 625, 628-29 (Minn. 1985) (holding vehicular homicide statute interpreted as not applicable to killing a fetus. "We have been informed . . . that of 25 jurisdictions in the United States which have considered the issue . . . 23 have adopted the 'born alive' rule. From the foregoing it is clear that the common law 'born alive' rule is now well-established in the great majority of jurisdictions."); *cf.* Rogers v. Tennessee, 121 S. Ct. 1693, 1701 (2001) (explaining that where defendant contended that he had no "fair warning" of the judicial abolition of Tennessee's common law "year and a day rule," which precluded a prosecution for murder where an assault victim died more than a year after he suffered the infliction of wounds caused by a perpetrator, because "the year and a day rule has been legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue," the rule had clearly outlived its usefulness and no longer existed so that where defendant's victim had died one and a half years after his attack, the Tennessee Supreme Courts' retroactive abolition was not unexpected or indefensible).

728. 423 U.S. 48 (1975) (per curiam).

729. *Rose*, 423 U.S. at 48 ("Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than five (5) years nor more than fifteen (15) years." (quoting TENN. CODE ANN. § 39-707 (1955))).

730. *Id.* at 48.

731. *Id.*

imprisonment.[732] "The Tennessee Court of Criminal Appeals affirmed the conviction, rejecting [the defendant's] claim that the Tennessee statute's proscription of 'crimes against nature' did not encompass cunnilingus, as well as his contention that the statute was unconstitutionally vague."[733] However, the United States Court of Appeals for the Sixth Circuit accepted the defendant's constitutional challenge, determining that the term "'crimes against nature' could not 'in and of itself withstand a charge of unconstitutional vagueness.'"[734] The Sixth Circuit reasoned that cunnilingus was not encompassed in the Tennessee statute because it could not find any previous Tennessee opinion stating that the statute applied to such sexual activity.[735] Therefore, this court held that the statute failed to give the defendant "fair warning" and, on those grounds, sustained the defendant's constitutional challenge.[736]

In its review, the United States Supreme Court addressed the issue whether under the Tennessee statute "crime[s] against nature" was to be "narrowly applied to only those acts constituting the common-law offense of sodomy, or [was it] to be broadly interpreted to encompass additional forms of sexual aberration."[737] In addressing this issue, the Court first pointed out that a "substantial number of jurisdictions" maintain the common law proscription of "crimes against nature."[738] The Court first referenced *State v. Crawford*,[739] wherein the Missouri Supreme Court rejected a claim that "its crime-against-nature statute was so devoid of definition as to be unconstitutional, pointing out that its provision was derived from early English law and broadly embraced sodomy, bestiality, buggery, fellatio, and cunnilingus within its terms."[740] The Court next looked to *Wainwright v. Stone*,[741] in which the Court previously held that a Florida statute "proscribing 'the abominable and detestable crime against nature' was not unconstitutionally vague, despite the fact that the [Florida] State Supreme Court had recently changed its mind about the statute's permissible scope."[742] Additionally, the Court pointed out that in *Fisher v. State*,[743] the Tennessee Supreme Court had previously rejected a claim that "'crime against nature' did not cover fellatio, repudiating those jurisdictions which had taken a 'narrow restrictive definition

732. *Id.*
733. *Id.* at 48-49.
734. *Id.* (quoting Locke v. Rose, 514 F.2d 570, 571 (6th Cir. 1975)).
735. *Id.*
736. *Id.*
737. *Id.* at 50-51.
738. *Id.* at 50.
739. 478 S.W.2d 314 (Mo. 1972).
740. *Rose*, 423 U.S. at 51 (citing *Crawford*, 478 S.W.2d 314).
741. 414 U.S. 21 (1973).
742. *Rose*, 423 U.S. at 51 (citing *Wainwright*, 414 U.S. at 22).
743. 277 S.W.2d 340 (Tenn. 1955).

of the offense.'"[744] After *Fisher*, the Tennessee Supreme Court, in *Sherrill v. State*,[745] reiterated the fact that the Tennessee "crimes against nature" statute encompassed the broader meaning and declared that "the prohibition brings all unnatural copulation with mankind or a beast, including sodomy, within its scope."[746] The United States Supreme Court then noted that a similar Maine statute, which the Tennessee court in *Sherrill* had cited with approval, "had been applied to cunnilingus before either Tennessee decision."[747] Finally, the Court stated that "[o]ther jurisdictions had already reasonably construed identical statutory language to apply to such acts. And given the Tennessee court's clear pronouncements that its statute was intended to effect broad coverage, there was nothing to indicate, clearly or otherwise, that respondent's acts were outside the scope of [the Tennessee enactment]."[748] Thus, the Court reversed the Sixth Circuit's finding of vagueness.

Another example of a judicial opinion that studied decisions from other jurisdictions in order to determine the meaning of a statute is *Commonwealth v. Sexton*.[749] In *Sexton*, discussed in an earlier section,[750] the Supreme Judicial Court of Massachusetts considered whether concrete pavement could constitute a "dangerous weapon" to support a charge of assault and battery with a dangerous weapon.[751] In this case, the defendant was charged with assault and battery with a dangerous weapon on a joint venture theory after he and his brother attacked a man after leaving a bar. During the attack, the defendant's brother slammed the victim's head against the pavement several times. After being convicted of assault and battery by means of a dangerous weapon, the Massachusetts appellate court reversed the defendant's conviction, holding that a dangerous weapon could only include an object a person could "wield" or "arm" himself with and, as such, "concrete pavement," being a stationary object, could not be a "dangerous weapon."[752]

In deciding this issue of first impression, the Supreme Judicial Court of Massachusetts first looked to its former decisions,[753] as well as to decisions of other jurisdictions, which had found "otherwise innocent items to fit this classification when used in a way which endangers another's

744. *Rose*, 423 U.S. at 52 (citing *Fisher*, 277 S.W.2d 340).
745. 321 S.W.2d 811 (Tenn. 1959).
746. *Rose*, 423 U.S. at 52 (citing *Sherrill*, 321 S.W.2d at 812 (quoting from State v. Cyr, 198 A. 743 (Me. 1938))).
747. *Id.*
748. *Id.* at 53.
749. 680 N.E.2d 23 (Mass. 1997).
750. *See supra* notes 600-13 and accompanying text.
751. *Sexton*, 680 N.E.2d at 24 (citing MASS. GEN. LAWS ANN. ch. 265, § 15A (West 2000)).
752. *Id.* (citing Commonwealth v. Sexton, 672 N.E.2d 991, 993 (Mass. App. Ct. 1996)).
753. *Id.* at 25.

safety."[754] The court observed that the United States Court of Appeals for the Seventh Circuit had ruled that a walking stick used to strike someone was a "dangerous weapon."[755] Meanwhile, the United States Court of Appeals for the Fourth Circuit had held that a chair "brought down upon a victim's head" was a "dangerous weapon."[756] The California Court of Appeals had determined that a rock was a "dangerous weapon."[757] The Maryland Supreme Court had held that a "microphone cord wrapped around a victim's neck" was a "dangerous weapon."[758] Additionally, the Michigan Court of Appeals had stated in dictum that an "automobile, broomstick, flashlight, and lighter fluid" could all constitute "dangerous weapons."[759]

The court next considered the fact that "a number of other jurisdictions" had held that the "stationary character" of an object did not prevent it from being used as a "dangerous weapon."[760] For instance, the court pointed out that the United States Court of Appeals for the Fourth Circuit had determined that steel cell bars were a "dangerous weapon."[761] Similarly, the North Carolina Supreme Court had determined that cell bars and floors were "dangerous weapons."[762] Moreover, the New York Supreme Court, Appellate Division, had held that cell bars[763] and, in another case, a plate glass window constituted "dangerous weapons."[764] Finally, the New York Court of Appeals and the Oregon Court of Appeals had both held that a sidewalk was a "dangerous weapon."[765] While the Massachusetts court recognized that some other jurisdictions had taken a contrary position, it held that a person who deliberately uses concrete pavement as a means of inflicting serious injury could be found guilty of assault and battery by means of a "dangerous weapon."[766]

Beyond the above approaches to discerning notice, it is conceivable that a particular political subdivision may gain interpretative guidance from another governmental unit within the same jurisdiction. In *City of Chicago v. Powell*,[767] an Illinois Appellate Court decision, definitional

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754. *Id.*

755. *Id.* at 25-26 (citing United States v. Loman, 551 F.2d 164, 169 (7th Cir.), *cert. denied*, 433 U.S. 912 (1977)).

756. *Id.* at 26 (citing United States v. Johnson, 324 F.2d 264, 266 (4th. Cir. 1963)).

757. *Id.* (citing People v. White, 212 Cal. App. 2d 464, 465 (Cal. Ct. App. 1963)).

758. *Id.* (citing Bennett v. State, 205 A.2d 393, 395 (Md. 1964)).

759. *Id.* (citing People v. Buford, 244 N.W.2d 351, 353 (Mich. Ct. App. 1976) (dictum)).

760. *Id.*

761. *Id.* (citing United States v. Murphy, 35 F.3d 143, 147 (4th Cir. 1994), *cert. denied*, 513 U.S. 1135 (1995)).

762. *Id.* (citing State v. Brinson, 448 S.E.2d 822 (N.C. 1994)).

763. *Id.* (citing People v. O'Hagan, 574 N.Y.S.2d 198 (N.Y. App. Div. 1991)).

764. *Id.* (citing People v. Coe, 564 N.Y.S.2d 255, 256 (N.Y. App. Div. 1991)).

765. *Id.* (citing People v. Galvin, 481 N.E.2d 565, 566 (N.Y. 1985); State v. Reed, 790 P.2d 551, 551 (Or. Ct. App. 1990)).

766. *Id.* at 27.

767. 735 N.E.2d 119 (Ill. App. Ct. 2000).

guidance regarding the scope of a municipal ordinance was extracted from state legislation. In that case, a Chicago municipal ordinance prohibiting "soliciting unlawful business" was used to prosecute a defendant who was soliciting prospective purchasers of heroin in public.[768] Other defendants were prosecuted for soliciting for purposes of prostitution, and yet another for soliciting the sale of false identification cards.[769] These defendants claimed the municipal law in question was vague in regards to what constituted "solicitation" and "unlawful business."[770] After a trial court granted one of the defendant's motion to dismiss, the City appealed.[771] The appellate court reversed the trial court's vagueness findings after concluding the words "solicitation" and "unlawful business" carried a clear meaning.[772] As to "solicitation," the appellate court pointed out that this term was defined in the Illinois Criminal Code as "to command, authorize, urge, incite, request, or advise another to commit an offense."[773] In addition, the Illinois penal law contained a specific prohibition outlawing criminal "solicitation" which occurs when one is "commanding, encouraging, or requesting another to commit a particular offense with the intent that the offense be committed."[774] Moreover, Black's Law Dictionary contained a definition,[775] as did caselaw that had upheld charges of illicit "solicitation of professional patronage,"[776] while other caselaw had upheld a statute prohibiting "solicitation of the sale of residential real estate once a property owner gave an agent notice that he did not intend to sell the property."[777] Regarding the meaning of "unlawful business," the appellate court noted that the Illinois Supreme Court had previously upheld very similar language.[778]

As observed previous sections, the fact that certain language in a specific criminal law has *not* been provided some definitional clarification may contribute to a court's finding of vagueness. In *Winters v. New York*,[779] discussed in several previous sections,[780] which involved examination of a prohibition criminalizing dissemination of "[o]bscene prints and articles," the United States Supreme Court found the measure vague

768. *Powell*, 735 N.E.2d at 122-23 (quoting CHICAGO, IL., MUN. CODE § 10-8-515(a) (1998)).
769. *Id.* at 125.
770. *Id.* at 122-25.
771. *Id.* at 123.
772. *Id.* at 128-30.
773. *Id.* at 128 (quoting 720 ILL. COMP. STAT. 5/2-20 (1998)).
774. *Id.* (quoting 720 ILL. COMP. STAT. 5/8-1 (1998)).
775. *Id.* (citing BLACK'S LAW DICTIONARY 1392 (6th ed. 1990)).
776. *Id.* (citing Desnick v. Dep't of Prof'l Regulation, 665 N.E.2d 1346, 1361 (Ill. 1996), *cert. denied*, 519 U.S. 965 (1996)).
777. *Id.* at 129 (citing Curtis v. Thompson, 840 F.2d 1291, 1305 (7th Cir. 1988)).
778. *Id.* at 130 (citing People v. Williams, 551 N.E.2d 631, 633 (Ill. 1990)).
779. 333 U.S. 507 (1948).
780. *See supra* notes 63-74, 448-49, 583-88 and accompanying text.

in part due to the *absence* of interpretative aids in other jurisdictions.[781] The Court pointed out that "[o]nly two other state courts, whose reports are printed appear to have construed language in their laws [dealing with depictions of deeds of bloodshed, lust or crime in some type of periodical] similar to that here involved."[782]

J. Treatises

Courts will often resort to consulting treatises when reviewing alleged statutory indefiniteness.[783] In *United States v. Gadreau*,[784] discussed in earlier sections,[785] the defendant raised a vagueness claim in a federal Racketeer Influenced & Corrupt Organizations Act ("RICO")[786] prosecution where a Colorado commercial bribery statute that was used as a predicate offense was challenged on due process grounds.[787] Here, the defendants were alleged to have conspired to engage in a violation of the state commercial bribery statute by giving money to an executive in a public service company in order to have him award contracts to a supply company in which they had a legal interest.[788] This Colorado statute provided that a violation occurs whenever a person "solicits, accepts, or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as . . . [a]gent or employee . . . or . . . [o]fficer . . . of an incorporated association."[789] After being charged under RICO[790] in federal district court, the defendants argued the "knowing[ly] violat[ing] . . . a duty of fidelity" language in the Colorado statute was void for vagueness.[791] The United States Court of Appeals for the Tenth Circuit disagreed.[792] The Tenth Circuit stated that the "authorities are unanimous that an officer or agent breaches his duty of loyalty to his corporation or principal by accepting bribes to compromise his principal's interests."[793] After examining pas-

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781. *Winters*, 333 U.S. at 511.

782. *Id.*

783. *See, e.g., Gaudreau*, 860 F.2d at 362 (consulting treatise to ascertain agent's duty toward principal); *cf.* Rogers v. Tennessee, 532 U.S. 451, 464-67 (2001) (discussing that common law murder required victim's death to occur within a year and a day (citing FRANCIS WHARTON, LAW OF HOMICIDE § 18, at 19-20 (3d ed. 1907)); however, this "year and a day" rule is no longer valid and defendant could not claim lack of notice regarding change in Tennessee law).

784. 860 F.2d 357 (10th Cir. 1988).

785. *See supra* notes 317-22, 401-20 and accompanying text.

786. 18 U.S.C. § 1962(d) (1986).

787. *Gaudreau*, 860 F.2d at 358.

788. *Id.* at 358-59.

789. *Id.* at 359 (quoting COLO. REV. STAT. § 18-5-401 (1986)).

790. *Id.* (citing 18 U.S.C. § 1962(d) (1986) (making it illegal to engage in a "pattern of racketeering" to benefit an "enterprise" with which one is "associated")).

791. *Id.* at 358.

792. *Id.*

793. *Id.* at 362.

sages from Fletcher's *Cyclopedia of the Law of Private Corporations*[794] and the *Restatement (Second) of Agency*,[795] the court of appeals ruled that the language in question carried a clear meaning.[796] Here, the defendants had conspired with the public service official to engage in a "pattern of commercial bribery," for which they were properly charged.[797]

As with other potential sources of "notice," it may turn out that examination of a respected treatise *supports* a vagueness claim.[798] In *Bouie v. City of Columbia*,[799] a United States Supreme Court decision, two black college students conducted a "sit in" demonstration at a drug store lunch counter in Columbia, South Carolina.[800] At first, no one approached the students to take their food order.[801] Then, a store employee placed a "no trespassing" sign in the area where they were seated.[802] Local police were called by the store manager and asked the two students to leave.[803] When the students refused, they were arrested for several offenses, including "criminal trespass."[804] This South Carolina offense was defined as an "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry."[805] Following their convictions, a

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794. *Id.* (quoting 3 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 884, at 348, 351-52 (perm. ed., rev. vol. 2002)).

795. *Id.* at 363 n.15 (citing RESTATEMENT (SECOND) OF AGENCY § 391 (1958)).

796. *Id.* at 362-63.

797. *Id.* at 359, 362-63.

798. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 161 n.4, 162 (1972) (noting that "vagrancy" laws were a remnant of archaic feudal laws designed to discourage movement of workers from their home area in search of improved work conditions (citing 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 203, 206, 266-75 (London, MacMillan 1883); 4 WILLIAM BLACKSTONE, COMMENTARIES *169) (municipal vagrancy ordinance unconstitutionally vague)); Keeler v. Superior Ct. of Amador County, 470 P.2d 617, 620 nn. 4,6, & 7, 629 (Cal. 1970) (finding common law required murder victim be born alive and not merely a fetus (citing 3 EDWARD COKE, INSTITUTES *58, HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND, III, ii, 4 (np. nd.); 3 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 32 (London, MacMillan 1883); 1 WILLIAM BLACKSTONE, COMMENTARIES *129-30; 1 MATTHEW HALE, PLEAS OF THE CROWN 433 (London, T. Payne 1778); 1 WILLIAM HAWKINS, PLEAS OF THE CROWN ch. 31, § 16 (London, Eliz. Nut 4th ed. 1762)) (defendant lacked notice murder statute included killing a fetus)); People v. Greer, 402 N.E.2d 203 (Ill. 1980) (determining the common law meaning of murder and that it had not included the killing of a fetus (referring to 3 EDWARD COKE, INSTITUTES *50; 1 WILLIAM BLACKSTONE, COMMENTARIES *129-30; 1 MATTHEW HALE, PLEAS OF THE CROWN 433 (London, T. Payne 1800))); State v. Soto, 378 N.W.2d 625, 628, 630 (Minn. 1985) (common law insisted that victim of homicide be a person "born alive" and not a fetus (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 530-32 (1972); 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 114, at 95-96 (1979); 40 C.J.S. *Homicide* § 2(b) (1944)) (accused had no notice vehicular homicide statute encompassed death of fetus)).

799. 378 U.S. 347 (1964).

800. *Bouie*, 378 U.S. at 348.

801. *Id.*

802. *Id.*

803. *Id.*

804. *Id.* at 349 (citing S.C. CODE ANN. § 16-386 (Law. Co-op. 1960)). The other arrests either did not result in convictions or resulted in convictions reversed on appeal. *Id.* at 348-49.

805. *Id.* (quoting S.C. CODE ANN. § 16-386 (Law. Co-op. 1960)).

due process vagueness challenge was advanced on the ground that the two students lacked notice.[806] These petitioners emphasized that they received no "notice . . . prohibiting such entry" either before they entered the drug store or before they sat in the restaurant booth.[807] However, the South Carolina Supreme Court ruled the statute not only covered the act of entry after notice not to enter was given, but also the act of *remaining* on the premises following notice to leave.[808] In its review, the United States Supreme Court stated that the two students had *not* been provided with notice that the statute encompassed *remaining* on another's property after being asked to leave.[809] The Court noted that the South Carolina law—which predated the South Carolina Supreme Court's interpretation of the trespass statute, holding that *remaining* on another's premises *was* prohibited—provided "petitioners no warning whatever that this criminal statute would be [so] construed."[810] Indeed, the "clear language and consistent judicial interpretation to the contrary, . . . incorporating a doctrine found only in civil trespass cases" belied the government's contention that fair notice had been provided in advance.[811] In support of its conclusion that these petitioners *at best* had notice that their conduct amounted to *civil* trespass, but certainly *not* criminal trespass, the Court not only referred Clark and Marshall's *On the Law of Crimes*[812] in the text of their opinion, but also cited to Wharton's *Criminal Law and Procedure* and Hochheimer's *Law of Crimes and Criminal Procedure*.[813] The Court concluded these petitioners could not be held to have notice of the South Carolina Supreme Court's *post-conviction* "unforeseeable and retroactive judicial expansion of narrow and precise statutory language" reflected in the criminal trespass statute and, as such, the decisions of the lower courts were reversed.[814]

K. Literature/Periodicals

Courts will even look to literature in order to determine the meaning of a particular phrase or a word in a statute.[815] An opinion illustrating the

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806. *Id.* at 349-50.

807. *Id.* at 350.

808. *Id.*

809. *Id.* at 360-63.

810. *Id.* at 359.

811. *Id.*

812. *Id.* at 358 (citing WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 607 (5th ed. 1952)).

813. *Id.* at n.6 (citing 2 RONALD A. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 868, at 735 (1957); LEWIS HOCHHEIMER, THE LAW OF CRIMES AND CRIMINAL PROCEDURE, INCLUDING FORMS AND PRECEDENTS §§ 360-63 (2d ed. 1904)).

814. *Id.* at 352, 355, 363.

815. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (referring to Walt Whitman, *Song of the Open Road, available at* http://www.bartleby.com/142/82.html (last visited Feb. 27, 2003); Vachel Lindsay, *I want to Go Wandering, available at* http://dlib.-stanford.edu:6520/text/ampo.html (last visited Apr. 19, 2003); HENRY DAVID THOREAU,

use of literature for interpretative guidance is *Muscarello v. United States*,[816] a decision that was discussed in several earlier sections.[817] In this case, the United States Supreme Court consolidated two cases[818] in order to address the question of whether the words "carries a firearm" as it appears in the federal criminal code is limited to the carrying of firearms on the person.[819]

In the first of these two cases, defendant Muscarello was arrested for selling marijuana, which he had carried in his truck to the location of the sale.[820] When police officers searched his truck, they found a handgun locked in the glove compartment.[821] The defendant admitted during plea provisions that he carried a gun for protection.[822] However, later the defendant retracted his statement and insisted that, in any event, having a handgun in the truck's glove compartment did not constitute the "carrying" of a firearm within the statutory meaning of the word "carries."[823] In the second case, defendants Cleveland and Gray-Santana placed several guns in a bag and then put the bag in the trunk of their car.[824] They then drove the car to a potential drug-selling location where they hoped to steal drugs from drug dealers.[825] At the scene, federal agents apprehended the two individuals and searched their car.[826] The agents discovered the guns and arrested the defendants.[827] All of these defendants were convicted of trafficking in illicit drugs while carrying a firearm contrary to federal law, whereupon they appealed.[828]

Two different United States Courts of Appeals concluded that the defendants were guilty of violating the federal criminal code because they had "'carrie[d]' guns during and in relation to a drug trafficking

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EXCURSIONS 251-53 (Boston, Houghton Mifflin, 1893), while ruling municipal vagrancy ordinance vague); Commonwealth v. Sexton, 680 N.E.2d 23, 27 (Mass. 1997) (quoting State v. Reed, 790 P.2d 551, 552 (Or. Ct. App. 1990) (quoting CERVANTES, *supra* note 612), while determining concrete pavement could constitute a "dangerous weapon" for purposes of assault and battery with a dangerous weapon and proscribed by state law).

816. 524 U.S. 125 (1998).

817. *See supra* notes 452-61, 482-99 and accompanying text.

818. United States v. Muscarello, 106 F.3d 636 (5th Cir. 1997); United States v. Cleveland, 106 F.3d 1056 (1st Cir. 1997).

819. *Muscarello*, 524 U.S. at 126-27. The provision of the federal criminal code, which defendants challenged, imposes a five year mandatory incarceration term upon an individual who "uses or carries a firearm" "during and in relation to" a "drug trafficking crime." 18 U.S.C. § 924(c)(1) (2000).

820. *Muscarello*, 524 U.S. at 127.

821. *Id.*

822. *Id.*

823. *Id.*

824. *Id.*

825. *Id.*

826. *Id.*

827. *Id.*

828. *Id.*

offense."[829] The United States Supreme Court granted certiorari to determine "whether the fact that the guns were found in the locked glove compartment, or the trunk, of a car" constituted "carrying" a firearm under the federal statute.[830]

Among other considerations in its analysis, the Court looked to the use of the word "carry" in literature to determine its meaning under the statute.[831] The Court stated:

> The greatest of writers have used the word [to include conveyance in a vehicle]. *See, e.g.*, the King James Bible, 2 Kings 9:28 ("[H]is servants carried him in a chariot to Jerusalem"); *id.*, Isaiah 30:6 ("[T]hey will carry their riches upon the shoulders of young asses"). Robinson Crusoe says "[w]ith my boat, I carry'd away every Thing." D. Defoe, Robinson Crusoe 174 (J. Crowely ed. 1972). And the owners of Queequeg's ship, Melville writes, "had lent him a [wheelbarrow], in which to carry his heavy chest to his boarding-house." H. Melville, Moby Dick 43 (U. Chicago 1952). This Court, too, has spoken [in our written opinions] of the "carrying" of drugs in a car or in its "trunk."[832]

The Court further acknowledged:

> These examples do not speak directly about carrying guns. But there is nothing linguistically special about the fact that weapons, rather than drugs, are being carried. Robinson Crusoe might have carried a gun in his boat; Queequeg might have borrowed a wheelbarrow in which to carry not a chest, but a harpoon. And, to make certain that there is no special ordinary English restriction (unmentioned in dictionaries) upon the use of "carry" in respect to guns, we have surveyed modern press usage, albeit crudely, by searching computerized newspaper databases—both the New York Times data base in Lexis/Nexis, and the "US News" data base in Westlaw. We looked for sentences in which the words "carry," "vehicle," and "weapon" (or variations thereof) all appear. We found thousands of such sentences, and random sampling suggests that many, perhaps more than one-third, are sentences used to convey the meaning at issue here, *i.e.*, the carrying of guns in a car.[833]

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829. *Id.*

830. *Id.* The Court acknowledged that there were two different meanings of the word "carry" that might be applicable in this case. *Id.* at 128. One meaning used the word as to "'carry' firearms in a wagon, car, truck, or other vehicle that one accompanies." *Id.* The second way the word "carry" can be used is in a specialized way, for example, "'bearing' or (in slang) 'packing' (as in 'packing a gun')." *Id.* The Court declared that the first meaning was the primary meaning of the word "carry" and concluded that Congress intended for the statute to use that meaning. *Id.*

831. *Id.* at 128-29.

832. *Id.* at 129 (citing California v. Acevedo, 500 U.S. 565, 572-73 (1991); Florida v. Jimeno, 500 U.S. 248, 249 (1991)).

833. *Id.*

The Court then turned to ordinary newspaper usage:

> The New York Times, for example, writes about "an ex-con" who "arrives home driving a stolen car and carrying a load of handguns," and an "official peace officer who carries a shotgun in his boat[.]" The Boston Globe refers to the arrest of a professional baseball player "for carrying a semiloaded automatic weapon in his car." The Colorado Springs Gazette Telegraph speaks of one "Russell" who "carries a gun hidden in his car." The Arkansas Gazette refers to a "house" that was "searched" in an effort to find "items that could be carried in a car, such as . . . guns." The San Diego Union-Tribune asks, "What, do they carry guns aboard these boats now?"[834]

The Court conceded that the word 'carry' had several meanings but determined that the uses of the word 'carry' in the aforementioned literary examples were the *primary* uses of the word "carry."[835] The Court concluded that "the relevant linguistic facts are that the word 'carry' in its ordinary sense includes carrying in a car and that the word, used in its ordinary sense, keeps the same meaning whether one carries a gun, a suitcase, or a banana."[836]

Another example of a court turning to literature to emphasize or determine the meaning of a statutory word or phrase is *State v. Reed*,[837] decided by the Oregon Court of Appeals. In this case, the defendant hit his girlfriend using his fists, the force of which knocked her down onto the sidewalk.[838] The defendant then repeatedly hit her head against the concrete.[839] The defendant was thereafter indicted for "unlawfully and knowingly [causing] physical injury to [the victim] by means of a dangerous weapon, to wit: concrete, by banging her head repeatedly against the concrete."[840] After the trial court found the defendant guilty, the defendant appealed.[841] The defendant argued on appeal that the concrete sidewalk, a stationary object, could not be considered a "dangerous weapon."[842] The Oregon Court of Appeals noted that the Oregon weapons statute contained a definition of "dangerous weapon" that used lan-

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834. *Id.* at 129-30 (internal citations omitted) (noting that THE NEW YORK TIMES MANUAL OF STYLE AND USAGE restricts "[t]imes journalists and editors to the use of proper English"); *see Foreword to* THE NEW YORK TIMES MANUAL OF STYLE AND USAGE, A DESK BOOK OF GUIDELINES FOR WRITERS AND EDITORS (L. Jordan rev. ed., 1976).

835. *Muscarello*, 524 U.S. at 130-31.

836. *Id.* at 131.

837. 790 P.2d 551 (Or. Ct. App. 1990).

838. *Reed*, 790 P.2d at 551.

839. *Id.*

840. *Id.*

841. *Id.*

842. *Id.* However, the defendant conceded that if he had taken a piece of concrete in his hand and used that piece of concrete to hit his girlfriend on her head, then the concrete would be considered a dangerous weapon. *Id.*

guage referring to *any* object which had the capacity to kill or cause serious bodily injury.[843] The court reasoned that "no matter how harmless [the concrete sidewalk] may appear when used for its customary purposes, [it] becomes a dangerous weapon when used in a manner that renders it capable of causing serious physical injury."[844] In this connection, the court considered language from Cervantes' famous literary work Don Quixote—"[w]hether the pitcher hits the stone or the stone hits the pitcher, it will be bad for the pitcher."[845] Based on this reasoning, namely, that the key issue was whether the object in question had the capacity to hurt another human being, the court upheld the trial court's decision.[846]

VI. OTHER RULES OF THUMB

Frequently, a court will uphold a statute against a vagueness challenge based not on the fact that the court can refer to a particular source to hold that the defendant had adequate notice, but more on the fact that the statute survives scrutiny when examined under the lens of what may be described as a judicial rule of thumb. These rules of thumb include considerations such as whether the statute proscribes an activity which is *malum in se* or *malum prohibitum*,[847] whether the statute carries the potential of intruding upon a constitutional right,[848] whether the defendant enjoyed a more circumspect alternative to engaging in conduct that treaded near the borderline of a criminal law,[849] and whether the statute somehow punished a person because of the person's status rather than because of the person's conduct.[850]

A. Malum Prohibitum/Malum in Se*?*

Occasionally, courts will refer to the distinction between "*malum in se*" offenses and "*malum prohibitum*" offenses in assessing whether a statute is vague.[851] A criminal act is considered *malum in se* where the underlying conduct is inherently wrong by its very nature, based on common morality and natural law principles.[852] A *malum prohibitum* stricture is "an act not inherently immoral but which becomes an offense

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843. *Id.* (quoting OR. REV. STAT. § 161.015(1) (1989), which defines a *dangerous weapon* as "any instrument, article or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury").

844. *Id.* at 551-52.

845. *Id.* at 552 (quoting CERVANTES, *supra* note 612).

846. *Id.*

847. *See infra* notes 851-70 and accompanying text.

848. *See infra* notes 871-92 and accompanying text.

849. *See infra* notes 892-919 and accompanying text.

850. *See infra* notes 920-47 and accompanying text.

851. *See, e.g.*, United States v. Donahue, 948 F.2d 438, 441 (8th Cir. 1991), *cert. denied*, 503 U.S. 976 (1992).

852. *See* M. CHERIF BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 270 (1978).

because its commission is expressly forbidden by positive law."[853] This distinction is useful in the arena of vagueness inquiries in that if a law is *malum in se* or, in plain language, a law that proscribes as illegal conduct any right-minded individual should realize is wrong, the law need not be as precise in its terms as would be the case where the law is *malum prohibitum* in nature. A simple illustration might be in order. All must agree murder is clearly wrong. As such, a murder statute can be cast in rather general terms: the intentional, knowing, or grossly reckless unjustified taking of the life of another human being. However, there is nothing intrinsically wrong with being in possession of an item that turns out to be drug paraphernalia, such as a small pipe or syringe that might be useable to smoke or inject a controlled substance. It is the *association* with illicit drug use that causes a legislative body to criminalize the unauthorized possession of the device. However, inasmuch as there is little, if any, *inherent* wrongfulness involved in regards to possessing the device itself, it is less likely the average citizen realizes possession of such a device is wrong and, as such, more precision will be required in defining exactly what devices are allowed and what ones are forbidden.

In *United States v. Donahue*,[854] the United States Court of Appeals for the Eighth Circuit looked to this rule of thumb, which tolerates less precise definitional language where the underlying conduct is *malum in se*.[855] Here, a defendant had been convicted of "bank robbery" in violation of federal law.[856] The defendant argued on appeal that the bank robbery statute, which read "[w]hoever, by force and violence, or by intimidation, takes . . . from the person or presence of another . . . any . . . money . . . belonging to . . . any bank [commits this offense]," was vague because it did not require proof of intent.[857] The Eighth Circuit quickly responded, stating that "[o]ne does not have to be a rocket scientist to know that bank robbery is a crime; and the statute merely makes *malum prohibitum* (and punishable in federal court) that which already is *malum in se*."[858] Here, because the underlying conduct was *malum in se*, the Eighth Circuit was able to dispose of the defendant's vagueness claim in a single sentence.[859]

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853. People v. Wilkinson, 674 N.E.2d 794, 798 (Ill. App. Ct. 1996) (quoting BLACK'S LAW DICTIONARY 865 (5th ed. 1979)). Indictments alleging a violation of Illinois "official misconduct" prohibition, being *malum prohibitum*, must be cast in precise terms so as to place the accused on notice before trial as to exactly what conduct amounted to a violation. *Id.* at 797 (citing People v. Kleffman, 412 N.E.2d 1057, 1061 (Ill. App. Ct. 1980)).

854. 948 F.2d 438 (8th Cir. 1991).

855. *Donahue*, 948 F.2d at 441.

856. *Id.* at 440 (citing 18 U.S.C. § 2113(a), (d) (1988)).

857. *Id.* at 441 (quoting 18 U.S.C. § 2113(a) (1988)).

858. *Id.*

859. *See id.*

Meanwhile, *People v. Heller*,[860] a New York Court of Appeals decision, illustrates the greater degree of clarity a reviewing court demands when it encounters a vagueness claim lodged against a *malum prohibitum* measure. In that case, the defendants were convicted of violating New York's "obscenity" law.[861] The New York law defined "obscene" as any "material or performance" which (1) "considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism," (2) "goes substantially beyond customary limits of candor in describing or presenting such matters," and (3) lacks "redeeming social value."[862] The defendants claimed a motion picture, *Blue Movie*, and a magazine, *Screw*, were not obscene as the State had alleged and, in any event, that the New York obscenity law was vague.[863] The New York Court of Appeals disagreed.[864] The court stated that the obscenity statute "sufficiently *describes* the conduct sought to be prohibited."[865] The court added:

> It takes no dictionary reference to understand what the words 'nudity', 'sex', 'excretion', 'sadism' or 'masochism' mean. The last three terms, which are descriptive of certain kinds of conduct whether portrayed live, printed or photographically, can be considered Malum in se in terms of Commercial exploitation. It is ludicrous and preposterous to suppose that a person dealing in such material would not understand the prohibitions here. The terms 'nudity' and 'sex' are only Malum prohibitum, of course, since each, to varying extents, could be commercially exploited for valid artistic, scientific, or literary ends. But surely, applying the sense of [the obscenity statute] as a whole, *there can be no doubt as to the narrow area sought to be prohibited.* When sex and nudity, and other sorts of prohibited conduct for that matter, are exploited substantially beyond customary limits of candor and would, as the average man views it, be the predominant element in the material so as to appeal, again predominantly, to lascivious cravings, then there can be no doubt as to what is prohibited. What we are talking about is hard-core pornography.[866]

Obviously, the fact that the legislature not only carefully defined "obscenity" consistent with language previously endorsed by the United States Supreme Court[867] but also defined other terms including "material" and "performance"[868] removed the statute from the reach of the

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860. 307 N.E.2d 805 (N.Y. 1973), *cert. denied*, 418 U.S. 944 (1974).

861. *Heller*, 307 N.E.2d at 807-08 (citing N.Y. PENAL LAW §§ 235.00, 235.05 (McKinney 1967)).

862. *Id.* at 811 (quoting N.Y. PENAL LAW § 235.00(1) (McKinney 1967)).

863. *Id.* at 807, 812-13.

864. *Id.* at 812-13, 815.

865. *Id.* at 812 (emphasis added).

866. *Id.* at 812-13 (emphasis added).

867. *Id.* at 808-11 (discussing at length Miller v. California, 413 U.S. 15 (1973)).

868. *Id.* at 811 (citing N.Y. PENAL LAW § 235.00(2)-(3) (McKinney 1967)).

void-for-vagueness doctrine.[869] The court concluded that "our obscenity statute is *sufficiently specific*" to withstand constitutional challenge.[870]

Donahue and *Heller* offer additional instruction on analyzing a vagueness claim. Thus, rule of thumb number one: if a penal measure is in the nature of *malum in se*, courts tend to tolerate more general language than in the case where the law is of the *malum prohibitum* category, where more detailed, narrow language is likely to be expected.

B. Constitutional Rights Involved?

Although this point was made, or alluded to, in several earlier sections, there is no question but that courts are more demanding of specificity of language in connection with laws that may touch on constitutional rights compared with statutes that carry no such possibility.[871] Indeed, the United States Supreme Court has stated, "[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."[872] Additionally, the Court has noted that "precision must be the touchstone of legislation . . . affecting basic freedoms."[873]

In *Cox v. Louisiana*,[874] the United States Supreme Court considered charges brought against a defendant who had led a group of students who wanted to protest segregation, discrimination, and the arrests of fellow students. This group had assembled at the Louisiana State Capitol and

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869. *Id.* at 814.

870. *Id.* (emphasis added).

871. Colautti v. Franklin, 439 U.S. 379, 390-91 (1979) (Insistence on "fair notice" and avoidance of "arbitrary and erratic" enforcement "appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." Here, certain provisions restricting availability of abortions found to be vague. (citations omitted)); Smith v. Goguen, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [void-for-vagueness] doctrine demands a greater degree of specificity than in other contexts." Here, flag misuse statute vague.); NAACP v. Button, 371 U.S. 415, 432 (1963) ("Standards of permissible statutory vagueness are strict in the area of free expression." Here, state proscription against advising prospective litigants to seek assistance of particular attorneys violates First Amendment.); *see also* Anthony Amsterdam, Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960) (noting "the doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms").

872. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982) (citing as examples *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy statute violates due process); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (anti-noise ordinance challenged on First Amendment grounds not vague although the claim of unconstitutionality "question is [a] close" one)).

873. Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964) (citing *Button*, 371 U.S. at 438).

874. 379 U.S. 536 (1965).

marched to a courthouse where "they sang, prayed and listened" to the defendant's speech.[875] For his efforts, the defendant was arrested on several charges including "disturbing the peace" and "obstructing public passages."[876] Following his conviction, the United States Supreme Court found both charges were contrary to the defendant's First Amendment rights of free speech and assembly.[877] When the Court addressed the "disturbing the peace" charge, it not only saw First Amendment problems but also vague legislation.[878] The Court noted this offense contained two elements: "(1) congregating with others 'with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned,' and (2) a refusal to move on after having been ordered to do so by a law enforcement officer."[879] Acknowledging that the second element was "narrow and specific," the Court pointed out that the Louisiana Supreme Court had interpreted the "breach of the peace" language as meaning "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet."[880] This statute, said the Court, "as authoritatively interpreted by the Louisiana Supreme Court, is unconstitutionally vague in its overly broad scope."[881] The Court explained:

> Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy. "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."[882]

Thus, the fact that someone might be disturbed or "agitated" by the defendant's unpopular speech was clearly not a sufficient warrant for imposition of the bite of the criminal law.[883]

Crimes which carry no potential for restriction of basic freedoms are less likely to encounter vagueness problems due to lack of narrow and specific language.[884] *United States v. National Dairy Products Corp.*[885] is

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875. *Cox*, 379 U.S. at 536.

876. *Id.* at 544-45, 553 (citing LA. REV. STAT. ANN. § 14:103.1 (West 1962) (disturbing the peace); LA. REV. STAT. ANN. § 14:100.1 (West 1962) (obstructing public passages)).

877. *Id.* at 552, 558.

878. *Id.* at 551.

879. *Id.*

880. *Id.* (quoting State v. Cox, 156 So. 2d 448, 455 (1963)).

881. *Id.*

882. *Id.* at 552 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

883. *Id.* at 551-52.

884. *See, e.g.*, *Vill. of Hoffman* Estates, 455 U.S. at 495-96 (municipal drug paraphernalia ordinance "does not restrict speech as such, but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose. The scope of the ordinance therefore does not embrace commercial speech"); *see also* Jonathan Weinberg, *Vagueness and Indecency*, 3 VILL. SPORTS & ENT. L. J. 221, 258 n.177 (1996) (The "due process vagueness doctrine is relatively forgiving when no First Amendment rights are at stake.").

885. 372 U.S. 29 (1963).

an example of this point. The defendants were charged with violating a provision of the Robinson-Patman Act, which made it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor."[886] The defendants claimed that the language "unreasonably low prices" was unconstitutionally vague.[887] The federal district court granted the defendants' motion to dismiss on this ground, but the United States Supreme Court saw otherwise.[888] The Court began its analysis with the familiar refrain that a "strong presumptive validity . . . attaches to an Act of Congress."[889] Here, the law merely restricted "sales made below cost without [a] legitimate commercial objective and with specific intent to destroy competition."[890] The Court added:

> In this connection we also note that the approach to "vagueness" governing a case like this is different from that followed in cases arising under the First Amendment. There we are concerned with the vagueness of the statute "on its face" because such vagueness may in itself deter constitutionally protected and socially desirable conduct. No such factor is present here where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable.[891]

Thus, the vagueness claim failed.[892]

The cases in this section illustrate rule of thumb number two: where an offense carries the possibility of inhibiting constitutional freedoms, precision in language is the watchword; where the stricture in question has no such potential, more general language is tolerated.

C. Circumspect Alternative Available to the Defendant?

Aside from caselaw where precision of language is a *must* because of the possibility that the statute may be stepping on basic constitutional rights, there appear questions in judicial opinions which essentially ask whether there existed a *more circumspect alternative* available to the defendant beyond engaging in questionable conduct which formed the basis for the criminal prosecution. Justice Frankfurter, in dissent in *Winters v. New York*,[893] insisted, "it is not violative of due process of law for a legislature in framing its criminal law to cast upon the public the *duty*

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886. *Nat'l Dairy Prods. Corp.*, 372 U.S. at 29 (quoting 18 U.S.C. § 13a (1958)).
887. *Id.* at 31.
888. *Id.* at 30.
889. *Id.* at 32.
890. *Id.* at 37.
891. *Id.* at 36 (citations omitted).
892. *Id.*
893. 333 U.S. 507 (1948).

of care and even of caution, provided that there is sufficient warning to one bent on obedience that he comes *near* the proscribed area."[894]

In *Nash v. United States*,[895] the United States Supreme Court reviewed two convictions arising out of violations of the federal Sherman Antitrust Act, namely, conspiracy in restraint of trade and conspiracy to monopolize trade.[896] Defendants were involved in marketing turpentine in a manner allegedly designed to destroy competition.[897] The antitrust law had been previously interpreted as prohibiting "only such contracts and combinations . . . , by reason of intent or the inherent nature of the contemplated acts, [that] prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."[898] The defendants argued "that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment"[899] was deemed wrong "by a jury of less competent men."[900] However, the Court disagreed.[901] Justice Holmes, writing for the majority, in his oft-quoted passage, said, "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."[902] He then declared, "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a *more circumspect conduct*."[903] In other words, Justice Holmes was insisting that where defendants were engaging in a variety of tactics to manipulate and control the marketing of this product, perhaps consideration should have been given to proceeding a bit more cautiously by perhaps making inquiry of the officialdom to assess the propriety of their business schemes, rather than push their behavior to the edge of what the law permits thereby risking falling off the edge into the realm of criminal prosecution.[904]

In *Boyce v. United States*,[905] the defendant was charged with violating Interstate Commerce Commission regulations that required "[d]rivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas [to] avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or

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894. *Winters*, 333 U.S. at 539 (Frankfurter, J., dissenting) (emphasis added).
895. 229 U.S. 373 (1913).
896. *Nash*, 229 U.S. at 374 (citing "act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U.S. Comp Stat. 1901, p. 3200").
897. *Id.* at 375-76.
898. *Id.* at 376 (citing United States v. American Tobacco Co., 221 U.S. 106, 179 (1911)).
899. *Id.*
900. *Id.*
901. *Id.* at 377-80.
902. *Id.* at 377.
903. *Id.* (emphasis added).
904. *Id.* at 377-80.
905. 342 U.S. 337 (1952).

through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings."[906] The defendant successfully moved in the federal district court to dismiss the indictments after arguing the "so far as practicable and where feasible" terminology was unconstitutionally vague.[907] However, the United States Court of Appeals reversed the order to dismiss and the United States Supreme Court affirmed the appellate ruling.[908] The Court noted:

> A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. *Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.*[909]

Thus, the *Boyce* Court followed the teachings of Justice Holmes and ruled that the defendant's void-for-vagueness claim had no basis.

Finally, in *Columbia Natural Resources, Inc. v. Tatum*,[910] the United States Court of Appeals for the Sixth Circuit denoted similar reasoning in a civil RICO case.[911] Here, oil and gas lessees brought an action against oil drillers alleging that the drillers had engaged in "claim-jumping schemes," which amounted to federal wire fraud, mail fraud, and Travel Act violations.[912] The plaintiffs' civil RICO claims were predicated on these alleged federal criminal violations that were said to constitute a "pattern of racketeering activity" violative of RICO.[913] However, the district court dismissed the plaintiffs' claims on the theory that what constitutes a "pattern of racketeering activity" under federal RICO was vague.[914] The Sixth Circuit saw the matter differently; pointing out that simply focusing on the language at issue without looking at "the rest of the statute" was inappropriate.[915] The court noted that federal RICO explicitly states that a "pattern" arises where a defendant has engaged in

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906. *Boyce*, 342 U.S. at 338-39 (citing 18 U.S.C. § 835 (1946)).
907. *Id.* at 340.
908. *Id.*
909. *Id.* (emphasis added).
910. 58 F.3d 1101 (6th Cir. 1995).
911. *Columbia Natural Res.*, 58 F.3d at 1101.
912. *Id.* at 1103.
913. *Id.* (citing 18 U.S.C. § 1962(c) (1994)).
914. *Id.* at 1104.
915. *Id.* at 1106.

two predicate offenses within the last 10 years and that the offenses that would qualify as predicate offenses were specified within the RICO statute.[916] The court, in rather stinging remarks, proceeded to dismantle the defendants' claim of vagueness.[917]

> [T]here is a clear standard of conduct initially proscribed by the pattern requirement of RICO. Here the statute clearly has a core; to avoid any possibility of falling under RICO's admittedly broad umbrella, one need only avoid committing an enumerated crime twice within ten years. If one can take the time to avoid committing mail or wire fraud, or extortion, or murder, or any of the other enumerated predicate offenses, all of which are federal or state criminal offenses in their own right, than one can sleep safe in the knowledge that he will not be found to have violated RICO.
>
> The issue, bluntly and simply framed, is whether a person of ordinary intelligence would know that committing dozens if not hundreds of acts of wire and mail fraud, over the course of almost a decade against the same victim, might constitute a pattern of racketeering activity. Since, by its terms it only takes a minimum of two acts, it is simply implausible for a party to claim that it was not aware that committing numerous predicate acts would expose it to potential RICO liability. The statute need not be exact just as price discrimination statutes and antitrust statutes are not exact. *The statute must simply put the party on notice that it is entering a potentially forbidden zone.*[918]

Thus, the Sixth Circuit in effect said the defendants' assertion that they were essentially clueless about what might constitute "a pattern of racketeering activity" was preposterous. They had not inadvertently slipped over the edge; rather, they had deliberately crossed it on numerous occasions.

Hence, rule of thumb number three: if a person is determined to walk the edge of the divide between criminal behavior and legitimate activity, it is fair to ask as to whether this individual's decision to place himself precariously close to the edge makes him a deserving candidate for the bite of the criminal law. Such a person's claim of lack of notice may be countered by a judicial response that questions that person's judgment in choosing to put himself at the edge in the first instance.

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916. *Id.* at 1106-08.
917. *Id.* at 1108-09.
918. *Id.* (emphasis added).

D. Status Criminality?

Criminal statutes that punish a person because of the personal condition[919] or status[920] of an individual rather than for one's conduct[921] are patently unconstitutional. In the seminal case addressing status criminality, *Robinson v. California*,[922] the United States Supreme Court ruled unconstitutional a California statute which punished "being addicted" to narcotics.[923] The Court ruled that punishing a person for being an addict was akin to punishing "a person for being mentally ill, suffering leprosy or being afflicted with venereal disease"—matters over which an individual has little or no control.[924]

In *Lanzetta v. New Jersey*,[925] discussed earlier,[926] a statute was ruled unconstitutionally vague contrary to due process in circumstances where the stricture in question could be described as essentially penalizing little more than one's status.[927] In this pre-*Robinson* ruling, the United States Supreme Court examined a state law that made it an offense to be a "gangster."[928] Specifically, the statute provided that a person "not engaged in any lawful occupation" who was "known to be a member of a gang" and had either been convicted of (1) being a disorderly person three or more times, or (2) any crime anywhere in the United States, "is declared to be a gangster."[929] In its ruling, the Court found the meaning of the words "gang" and "gangster" to be vague.[930] In that connection, the Court observed that "[t]he challenged provision condemns no act or omission."[931] Obviously, then, this measure's criminalization, at least in part, of a person's status contributed to the Court's finding that the statute was void for vagueness.

In *Papachristou v. City of Jacksonville*,[932] also discussed earlier,[933] the United States Supreme Court's ruling finding a municipal "vagrancy"

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919. Robinson v. California, 370 U.S. 660, 661 n.1, 666 (1962) (ruling that a statute prohibiting being addicted to narcotics constitutes cruel and unusual punishment violative of the Eighth Amendment).

920. Farber v. Rochford, 407 F. Supp 529, 530, 533 (N.D. Ill. 1975) (holding an ordinance prohibiting "known prostitute's" from loitering unconstitutional).

921. *See* Powell v. Texas, 392 U.S. 514, 531-37 (1968) (distinguishing *Robinson*, 370 U.S. 660, in a case where chronic alcoholic convicted of public drunkenness, a matter involving individual *behavior* and not merely punishing status).

922. *Robinson*, 370 U.S. at 660.

923. *Id.* at 661 (quoting CAL. HEALTH & SAFETY CODE § 11721 (West 1955)).

924. *Id.* at 666.

925. 306 U.S. 451 (1939).

926. *See supra* notes 550-59 and accompanying text.

927. *Lanzetta*, 306 U.S. at 458.

928. *Id.* at 452.

929. *Id.* (quoting N.J. REV. STAT. § 2:136-5 (1937)).

930. *Id.* at 456-58.

931. *Id.* at 458.

932. 405 U.S. 156 (1972).

ordinance unconstitutionally vague likewise reflected status criminality overtones.[934] The statute in question explicitly stated that the likes of "rogues and vagabonds," "common gamblers," "common drunkards," "habitual loafers," and those "habitually living upon the earnings of their wives or minor children" were to be "deemed vagrants."[935] In the opinion of the Court, "[t]hose generally implicated by the imprecise terms of the ordinance -- poor people, nonconformists, dissenters, idlers -- may be required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts."[936] This, said the Court, was constitutionally intolerable.[937]

In a case involving a Chicago municipal ordinance, *Farber v. Rochford*,[938] the United States District Court for the Northern District of Illinois offered a clear illustration of how due process protections contained in the Fourteenth Amendment could be used to successfully attack the constitutionality of a stricture that made it unlawful for a person who was "known to be a narcotics addict" or "known to be a prostitute" or previously convicted of prostitution to, among other things, either "congregate" with others of the same class in a public place or "loaf or loiter" in or about premises where alcoholic beverages were sold.[939] The court struck down the statute as being unconstitutional in the face of due process considerations on the theory that a person's "reputation" was the basis for being subjected to criminal prosecution, rather than the person's acts.[940] Specifically, the court stated this statute "and other ordinances of its ilk . . . suffer from the basic infirmity that they look towards the status of the suspect rather than his conduct as the determinative factor of guilt."[941] In response to the municipality's claim that the statute was actually directed at the act of "congregating" or "loitering by these persons," the court said, "There is no *actus reus* at all required by the ordinance, only [innocent] conduct which, while occasionally an 'adjunct' to illicit behavior, is of itself perfectly defensible."[942] Additionally, that portion of the ordinance that outlawed known narcotics addicts or known prostitutes from *congregating* was found to be contrary to the constitutional right to assemble.[943] As such, the ordinance was considered unconstitutional on its face.[944]

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933. *See supra* notes 95-120 and accompanying text.
934. *Papachristou*, 405 U.S. at 171.
935. *Id.* at 157 n.1 (quoting JACKSONVILLE, FLA., ORDINANCE CODE § 26-57)).
936. *Id.* at 170.
937. *Id.* at 171.
938. 407 F. Supp. 529 (N.D. Ill. 1975).
939. *Farber*, 407 F. Supp. at 530 (quoting CHICAGO, ILL., MUNICIPAL CODE § 192-6).
940. *Id.* at 532.
941. *Id.* at 533.
942. *Id.*
943. *Id.* at 534.
944. *Id.* at 535.

Another Chicago municipal ordinance was found to unconstitutionally focus on the status of the party. *City of Chicago v. Youkhana*,[945] decided by the Illinois Appellate Court, involved the previously discussed Chicago ordinance that prohibited street gang members from loitering in a public place.[946] The appellate court found the ordinance unconstitutional because, among other reasons, it punished a person due to his or her *status* as a member of a gang, instead of for the action of illegal loitering.[947] The Illinois Supreme Court, in the consolidated decision of *City of Chicago v. Morales*,[948] agreed that the ordinance was unconstitutional although it did not reach the status issue.[949] Likewise, the United States Supreme Court found the loitering stricture—"to remain in one place with no apparent purpose"—to be unconstitutionally vague without addressing the status claim.[950]

In any event, the cases in this section reflect rule of thumb number four: where a measure is challenged on vagueness grounds, if it is largely directed at a person's status rather than the person's conduct, that may well tilt the balance in favor of a void for vagueness finding.

CONCLUSION

In this time in American history when the focal point of discussion is accounting and criminal law—Enron, Arthur Andersen Accounting, WorldCom, and even the FBI and CIA in regards to their overlooking evidence of the impending "9/11"—I thought I would bring this review of vagueness, ambiguity, and other uncertainty in American criminal law to a conclusion by momentarily examining the word accounting. My rather dated American Heritage Dictionary defines "accounting" as "[t]he bookkeeping methods involved in making a financial record of business transactions and in the preparation of statements concerning the assets, liabilities, and operating results of a business" and "account" as, among other things, "a precise list or enumeration of monetary transactions."[951] Interestingly, we now find an "accounting," (the noun) or "accounting" (the verb) means many things to many people. In my brief undergraduate excursion into the study of accounting, I was left with the notion that accounting connoted something on the order of mathematical certainty. Now my reading of the newspapers (as well as the vacillating

945. 660 N.E.2d 34 (Ill. App. Ct.), *aff'd sub nom.*, City of Chicago v. Morales, 687 N.E.2d 53 (Ill. 1995), *aff'd*, 527 U.S. 41 (1999).

946. *See supra* notes 134-159 and accompanying text.

947. *Youkhana*, 660 N.E.2d at 42.

948. *Morales*, 687 N.E.2d at 53 (Ill. 1995).

949. *Id.* at 59.

950. *Morales*, 527 U.S. at 65.

951. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (M. Morris, ed., New College ed. 1981).

worth of my stock portfolio) suggests an accounting is whatever the accountant says it is.

So too, with words and phrases in American criminal law. They mean whatever the courts say they mean.[952] Sometimes the statutory language is seen as precise and clear and, at other times, the words being examined are said to be vague, ambiguous, or uncertain. My effort in all of this is to remind those studying this subject that there are never totally clear statutory definitions—hardly any great revelation—but that these are a *smorgasbord* of general principles and guidelines, interpretative sources, and rules of thumb that appear in the caselaw from which courts can pick and choose to uphold or strike down criminal law legislation as they see fit.

Judicial review of criminal law is not an exact science and it never will be. Oftentimes the debates over the meaning of the criminal law may be contentious and, yes, sometimes the judicial outcomes unpredictable. But these exercises, in the end, demonstrate that resolutions of these matters, however imperfect, in American society can and do occur. In an uncertain world where resolution is often sought by terrorist bombings, military invasions, and brutish force, thankfully we arrive at resolution of the meaning of our law peaceably in a court of law.

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952. Almost fifteen years ago, Professor Francis Allen pointed out the demise of true adherence of the principle of legality. *See generally* Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter Day Adventures of the Nulla Poena Principle*, 29 ARIZ. L. REV. 385 (1987). He attributed this to "fear of, and outrage over, [rising] crime rates;" *id.* at 400, the assignment of the criminal law to "more difficult and complex functions," such as "organized crime," "white-collar" crime and economic regulation; *id.* at 402, and a misguided legislative movement to legislate morality, *id.* at 406, 410-11. Recent events, within this country and outside, can only exacerbate the situation.

A DECADE OF *DAUBERT*

DAVID G. OWEN†

INTRODUCTION

Products liability litigation, involving the inner workings of science and technology, often resolves into a "battle of the experts."[1] Proof of defectiveness and causation often requires engineers, toxicologists, epidemiologists, and other technical experts to explain the relevant science and engineering of product safety and accidents to a lay jury and the court.[2] Understanding the various aspects of the design, manufacture, and labeling of products normally involves a host of complex, technical considerations requiring specialized expertise. Thus, mechanical, chemical, and materials engineers, chemists, physicists, pharmacologists, epidemiologists, and other technical specialists are often necessary to provide the fact finder with a comprehensive understanding of the manufacturing of a product, how it operates, whether and how it may have malfunctioned or otherwise caused an accident, and how a different design could have avoided similar accidents.

As products liability law spread its tentacles over the nation during the last third of the twentieth century, the expert witness business was born, grew up, and flourished. Tormented by a mounting plague of supposed "experts" testifying to "junk science" in courtrooms across the nation, manufacturers increasingly complained about the unfairness and illogic of basing outcomes in major products liability litigation on such

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† Carolina Distinguished Professor of Law, University of South Carolina. A later version of this article will appear as part of a chapter in DAVID G. OWEN, PRODUCTS LIABILITY LAW (forthcoming 2004). Thanks to Nikki Lee for research assistance. To shield him from the rigors of a *Daubert* challenge, I did not seek advice from Dr. Hubbard.

1. *See, e.g.*, Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1535 (D.C. Cir. 1985) (ruling that conflicting expert conclusions result in a "classic battle of the experts, a battle in which the jury must decide the victor"); Jenkins v. Gen. Motors Corp., 446 F.2d 377, 380 (5th Cir. 1971) ("It all boils down to a battle of experts."). This simple fact of products liability litigation has long been true. *See generally* DAVID PECK, DECISION AT LAW 40-64 (1961) (detailing expert testimony on nature of break, of hickory grain of spoke, and of tests and inspections of broken automobile wheel involved in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916)).

2. *See, e.g.*, Bruno v. Toyotomi U.S.A., Inc., 203 F.R.D. 77, 80 (N.D.N.Y. 2001) (granting summary judgment for defendant where plaintiff failed to produce qualified and reliable expert testimony on defectiveness and causation); Mozes v. Medtronic, Inc., 14 F. Supp. 2d 1124, 1128 (D. Minn. 1998) (granting summary judgment for defendant where plaintiff failed to produce qualified and reliable expert testimony on defectiveness and causation); Sears, Roebuck & Co. v. Haven Hills Farm, Inc., 395 So. 2d 991, 995 (Ala. 1981) ("Ordinarily, expert testimony is required" in cases based on strict products liability in tort.).

slender, defective reeds. In 1993, the United States Supreme Court joined issue with the problem in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[3] A decade now has passed, and it is time for a review of the use and abuse of expert testimony in products liability litigation.

I. SIGNIFICANCE OF EXPERT TESTIMONY

Expert testimony has special significance in products liability litigation for several reasons. Most fundamentally, judges and juries in most products liability cases use this testimony as the primary tool in deciding whether a particular product was defective and whether that defect caused the plaintiff's injury. Some products, and the causes of some product failures, are quite simple to understand, such as the explosion of a thermos bottle[4] or the presence of a cockroach in a sandwich.[5] In such cases, expert testimony is unnecessary for there is little "beyond the ken" of the judge or jury.[6] But the mechanisms of most product failures are more complex. In such cases, judges and juries generally are dependent on the information and opinions provided by scientific and technical specialists on the complex issues that typically lie at the heart of a products liability case. In this respect, judges and juries, who impliedly are incapable of understanding the technical aspects of such a case, are at the mercy of the experts. In addition, the law of evidence gives experts especially wide latitude to offer opinions not available to ordinary witnesses.[7] For these reasons, expert testimony can be particularly powerful guidance, and it has a particular power to mislead.[8] While the rules governing

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3. 509 U.S. 579 (1993).

4. *See* Virgil v. Kash N' Karry Service Corp., 484 A.2d 652, 656 (Md. Ct. Spec. App. 1984) (implosion).

5. *See* Bullara v. Checker's Drive-In Rest., Inc., 736 So. 936, 938 (La. Ct. App. 1999) (chili dog).

6. *Virgil*, 484 A.2d at 656 ("The general rule is well established that expert testimony is only required when the subject of the inference is so particularly related to some science or profession that it is beyond the ken of the average layman."); *see* Faryniarz v. Nike, Inc., No. 00 Civ. 2623(NRB), 2002 WL 530997, at *2 (S.D.N.Y. Apr. 8, 2002) (finding that expert testimony was unnecessary for jury to find running shoes were defectively designed because of excessively long laces that could get caught on pull-tab).

7. *See* FED. R. EVID. 701, 702, 703, 705 and similar state evidentiary rules. *See generally* Daubert v. Merrell Dow Pharm., Inc, 509 U.S. 579, 589 (1993) ("Federal Rules of Evidence, not *Frye*, provide the standard for admitting expert scientific testimony in a federal trial.").

8. *See Daubert*, 509 U.S. at 595 ("Judge Weinstein has explained: 'Expert evidence can be both powerful and misleading because of the difficulty in evaluating it.'" (citation omitted)); Bert Black et al., *Science and the Law in the Wake of* Daubert*: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 789 (1994) ("[M]ost commentators believe ostensibly scientific testimony may sway a jury even when as science it is palpably wrong. Science can be greatly distorted by the pressures of litigation, but once it is admitted into evidence, it has an imprimatur of legitimacy and validity, and cross-examination often will not expose its flaws."); *see also* Adina Schwartz, *A "Dogma of Empiricism" Revisited:* Daubert v. Merrell Dow Pharmaceuticals, Inc. *and the Need to Resurrect the Philosophical Insight of* Frye v. United States, 10 HARV. J.L. & TECH. 149, 196-98 (1997).

the admissibility of expert testimony on science and technology are treated extensively elsewhere,[9] the topic is so centrally important to products liability litigation that it deserves special treatment in this context.

Expert testimony is often necessary to establish defectiveness in manufacture, design, and warnings and instructions. As mentioned earlier, juries normally need the guidance of expert testimony to understand the technical aspects of both defectiveness and causation. Without such testimony, juries would be left to surmise, conjecture, and speculation on these central elements of every case and cause. Thus, a products liability

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9. *See generally* D. FAIGMAN ET AL., SCIENCE IN THE LAW—STANDARDS, STATISTICS & RESEARCH ISSUES (2002) (giving an in-depth coverage of admissibility, nature of expertise, ethical issues, scientific method, statistical proof, survey research, epidemiology, and toxicology); LOUIS FRUMER & MELVIN FRIEDMAN, PRODUCTS LIABILITY § 18.06 (2001); MADDEN & OWEN ON PRODUCTS LIABILITY § 27:8 to :9 (3d ed. 2000); CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE §§ 13-19. (John W. Strong ed., 4th ed. 1992) ("General scientific acceptance is a proper condition for taking judicial notice of scientific facts, but it is not a suitable criterion for the admissibility of scientific evidence."); REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (1994); WEINSTEIN'S FEDERAL EVIDENCE ch. 702 (2d ed. 2002). There are hundreds of law review and practice articles on the topic. *See, e.g.*, Samuel R. Gross, *Substance & Form in Scientific Evidence: What* Daubert *Didn't Do*, *in* REFORMING THE CIVIL JUSTICE SYSTEM 234, 242-46 (Larry Kramer ed., 1996); Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539 (1996); Sarah Brew, *Where the Rubber Hits the Road: Steering the Trial Court Through a Post-*Kumho Tire *Evaluation of Expert Testimony*, 27 WM. MITCHELL L. REV. 467 (2000); Daniel J. Capra, *The* Daubert *Puzzle*, 32 GA. L. REV. 699 (1998); Marjan Damaska, *Truth In Adjudication*, 49 HASTINGS L.J. 289 (1997); David L. Faigman, *The Law's Scientific Revolution: Reflections and Ruminations on the Law's Use of Experts in Year Seven of the Revolution*, 57 WASH. & LEE L. REV. 661 (2000); G. Michael Fenner, *The* Daubert *Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939 (1996); Michael H. Graham, *The Expert Witness Predicament: Determining "Reliable" Under the Gatekeeping Test of* Daubert, Kumho, *and Proposed Amended Rule 702 of the Federal Rules of Evidence*, 54 U. MIAMI L. REV. 317 (2000); Michael Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 NW. U.L. REV. 643, 661 (1992); Sara K. Ledford, *The Implications of* Kumho Tire*: Applying* Daubert *Analysis to Warning Label Testimony in Products Liability Cases*, 76 IND. L.J. 465 (2001) (discussing the difficulties in attempting to apply *Daubert* criteria to warning label testimony); Mark R. Patterson, *Conflicts of Interest in Scientific Expert Testimony*, 40 WM. & MARY L. REV. 1314 (1999); Xavier Pena, *The Effective Evaluation of Expert Reliability*, 20 REV. LITIG. 743 (2001); Michael J. Saks, *The Aftermath of* Daubert*: An Evolving Jurisprudence of Expert Evidence*, 40 JURIMETRICS 229 (2000); Schwartz, *supra* note 8; Richard T. Stilwell, Kumho Tire*: The Battle of the Experts Continues*, 19 REV. LITIG. 193 (2000); Laurens Walker & John Monahan, *Scientific Authority: The Breast Implant Litigation and Beyond*, 86 VA. L. REV. 801 (2000) (examining causation study by National Science Panel); *see also* Brett B. Baber, *The Necessity for Expert Testimony to Sustain the Plaintiff's Burden of Proof in Negligence and Strict Liability Actions*, 15 ME. B.J. 174 (2000); Patricia A. Krebs & Bryan J. De Tray, Kumho Tire Co. v. Carmichael: *A Flexible Approach to Analyzing Expert Testimony Under* Daubert, 34 TORT & INS. L. J. 989 (1999); D. Alan Rudlin, *The Judge as Gatekeeper: What Hath* Daubert-Joiner-Kumho *Wrought?*, 29 PROD. SAF. & LIAB. REP. 329 (2001); Charles D. Weller, *The Litigator's Guide to the* Daubert *Quartet: The Use of Experts After* Daubert, 1 EXPERT EVID. REP. 62 (2001); Larry E. Coben, *The* Daubert *Decision: Gatekeeper or Executioner?*, TRIAL, Aug. 1996, at 52. The *BNA Expert Evidence Report* reports recent cases.

case usually will fail without proof of defect and cause by expert testimony.[10]

Manufacturing defects are sometimes so self-evident that expert proof may not be required, but expert testimony ordinarily will be necessary to establish that an accident product deviated from the manufacturer's design specifications.[11] And while reliance on the malfunction doctrine can sometimes assist a plaintiff when the precise cause of a product failure cannot be shown,[12] expert proof is often necessary, even under this theory of recovery, to rule out other possible causes of the accident.[13]

Simple warnings issues sometimes are entirely comprehensible by a jury and thus may not necessitate expert testimony.[14] But the science of how to communicate danger and safety information most effectively is evolving in sophistication such that expert testimony on warnings and instructions is often helpful, and sometimes mandatory, as in many cases involving the labeling of dangerous machinery,[15] pharmaceutical drugs,[16] and in other specialized labeling situations.[17]

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10. *See, e.g.*, Cantrell v. Weber-Stephen Prod. Co., 2002 WL 1370671, at *2 (4th Cir. 2002) (applying Md. law and granting summary judgment for defendant where plaintiff failed to provide expert testimony on why gas grill exploded; without such testimony "[a] jury could only infer the presence of a defect in the grill by engaging in 'surmise, conjecture, or speculation'" (quoting Jensen v. Am. Motors Corp. 437 A.2d 242, 245 (Md. 1981))); Hochen v. Bobst Group, Inc., 290 F.3d 446, 450-51 (1st Cir. 2002) (applying Mass. law and affirming summary judgment against plaintiff who failed to designate expert under FED.R.CIV.P. 26(a)(2) in complex case involving allegedly defective design and manufacture of printing press); Moisenko v. Volkswagenwerk Aktiengesellschaft, 100 F. Supp. 2d 489, 492-93 (W.D. Mich. 2000) ("Without expert evidence comparing a striker plate with a flat-ending to one with a rolling-ball ending, Mr. Moisenko cannot meet the risk-utility test, and thus cannot establish a design defect. . . . As to the manufacturing defect claim, it is well-settled that such a claim cannot be proven without expert testimony." Defendant's motion for summary judgment was granted.); Lessard v. Caterpillar, Inc., 737 N.Y.S.2d 191, 192 (N.Y. App. Div. 2002) ("The court properly granted defendant's motion for a directed verdict, given the inability of plaintiff to establish a prima facie case of design defect in the absence of expert testimony."); Brooks v. Colonial Chevrolet-Buick, Inc., 579 So. 2d 1328, 1332 (Ala. 1991) ("Because of the complex and technical nature of the product and in order to present evidence from which a lay jury may reasonably infer that a defective condition of the product was the cause of the product's failure and the cause of the resultant injury to the plaintiff, expert testimony is usually essential and, therefore, usually required."); *see also* MADDEN & OWEN, *supra* note 9, § 27.9 (discussing Weisgram v. Marley Co., 528 U.S. 440 (2000)).

11. *See* MADDEN & OWEN, *supra* note 9, § 7.11.

12. *See id.* § 7.12.

13. *See id.*

14. *See, e.g.*, Robertson v. Norton Co., 148 F.3d 905, 907 (8th Cir. 1998) (noting issue).

15. For a description of a sophisticated system, see PRODUCT SAFETY SIGN AND LABEL SYSTEM (1993).

16. *See, e.g.*, HANDBOOK OF NONPRESCRIPTION DRUGS (Am. Pharmaceutical Assoc. ed., 13th ed. 2002); PATIENT INFORMATION IN MEDICINE (Ronald Mann ed., 1991).

17. *See generally* MADDEN & OWEN, *supra* note 9, at ch. 9; Ledford, *supra* note 9, at 465 (applying *Daubert* to warning-label testimony).

Most jurisdictions define design defectiveness in terms of risk-utility analysis, an analytical approach that requires an evaluation of the feasibility, costs, and benefits of altering a design to avoid an injury.[18] Such claims almost always require expert proof, sometimes on the mechanisms of how the accident occurred and almost always on how the accident feasibly could have been designed away.[19] However, if design defectiveness is defined purely in consumer expectation terms,[20] the appropriateness of expert testimony may depend upon the type of product whose design is under scrutiny. A jury might well need expert guidance on the safety expectations of users of industrial, professional, or other products designed for use by specialists in a field. But consumer goods, particularly simple ones, are another matter. It is difficult to see how the opinion of a technical or other expert on ordinary consumer expectations about the safety of a simple consumer product could assist a jury, which would seem to preclude expert testimony on defectiveness in such cases.[21] Even design cases may be simple, however, in which case expert testimony is unnecessary.[22]

Regardless of the type of defect, expert testimony often is necessary to prove causation, the link that connects the product defect to the plaintiff's harm.[23] Causation is most typically in issue in toxic substance cases, where expert testimony on causation (and defectiveness) almost invariably is necessary.[24] Even in cases involving durable goods, where proofs of defectiveness and causation are often linked together closely, expert testimony on how the defect caused the harm is usually necessary to the plaintiff's case.[25]

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18. *See generally* MADDEN & OWEN, *supra* note 9, at ch. 8.

19. *See id.*

20. *Id.*

21. Expert witnesses normally cannot assist the jury in determining consumer expectations. *See, e.g.*, Soule v. Gen. Motors Corp., 882 P.2d 298, 308 (Cal. 1994) ("[W]here the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect. Use of expert testimony for that purpose would invade the jury's function . . . ."); Campbell v. Gen. Motors Corp., 649 P.2d 224, 233 (Cal. 1982) ("[O]ne can hardly imagine what credentials a witness must possess before he can be certified as an expert on the issue of *ordinary* consumer expectations." (quoting G. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 480 (1979))).

22. *See Faryniarz*, 2002 WL 530997, at *2.

23. *See generally* MADDEN & OWEN, *supra* note 9, at ch. 12.

24. *See, e.g.*, Rutigliano v. Valley Business Forms, 929 F. Supp. 779, 783 (D.N.J. 1996) (granting summary judgment claim of "formaldehyde sensitization" from exposure to chemical in carbonless carbon paper); *see generally* David Bernstein, *Out of the Fryeing Pan and Into the Fire: The Expert Witness Problem in Toxic Tort Litigation*, 10 REV. LITIG. 117, 119-23 (1990) (examining expert witness problems in toxic substance cases). Causation in toxic substance litigation is treated generally in MADDEN & OWEN, *supra* note 9, § 12.5.

25. *See, e.g.*, Booth v. Black & Decker, Inc., 166 F. Supp. 2d 215, 217 (E.D. Pa. 2001) (regarding a fire allegedly caused by toaster oven).

To give but a few examples, judges and juries surely will need expert tutelage on defectiveness if the issue in dispute is whether the speed control mechanism for a paver should have been in the form of a lever rather than a rotary dial;[26] whether a sport utility vehicle should have been equipped with a barrier between the front seats and cargo area, together with a warning, to make it safe for occupants in the rear;[27] whether and how the steering gearbox in a vehicle may have been improperly assembled or designed;[28] whether the operator compartment on a forklift should have been equipped with a door[29] or wire mesh;[30] whether cigarettes could have been made safer;[31] or whether a hay baler should have had a guard.[32] Similarly, on causation, the fact finder will almost certainly need expert testimony if the parties disagree on whether a causal link exists between a plaintiff's ingestion of Viagra and his heart attack;[33] an allegedly defective product and a house fire that starts nearby;[34] the absence of a kill switch on an outboard motor and injuries to the plaintiff's hand;[35] an anti-depressant drug taken by a teenager and his suicide;[36] a spinal rod implanted in the plaintiff's back to eliminate a painful condition and his quite similar post-operative pain;[37] or exposure to various chemical substances and many illnesses and diseases.[38] In short, experts are crucial to both the prosecution and defense of a products liability case.

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26. *See* Alfred v. Caterpillar, Inc., 262 F.3d 1083, 1086 (10th Cir. 2001).

27. *See* Bowersfield v. Suzuki Motor Corp., 151 F. Supp. 2d 625, 630 (E.D. Pa. 2001).

28. *See* Smith v. Ford Motor Co., 215 F.3d 713, 716-17 (7th Cir. 2000).

29. *See, e.g.*, Dhillon v. Crown Controls Corp., 269 F.3d 865, 865 (7th Cir. 2001); Berry v. Crown Equip. Corp., 108 F. Supp. 2d 743, 747 (E.D. Mich. 2000).

30. *See* Bourelle v. Crown Equip. Corp., 220 F.3d 532, 535 (7th Cir. 2000).

31. *See* LaBelle v. Phillip Morris, Inc., No. 2-98-3235-23 (D.S.C. July 5, 2001), *available at* http://www.scd.uscourts.gov/DOCS/Pmd/LABELLE.pdf 11-13.

32. *See* Masters v. Hesston Corp., No. 99-C50279, 2001 WL 567736, at *4 (N.D. Ill. May 23, 2001).

33. *See* Brumley v. Pfizer, Inc., 200 F.R.D. 596, 601 (S.D. Tex. 2001).

34. *See, e.g., Weisgram*, 528 U.S. at 440 (heater); Pride v. BIC Corp., 218 F.3d 566, 569 (6th Cir. 2000) (cigarette lighter); Travelers Prop. & Cas. Corp. v. Gen. Elec. Co., 150 F. Supp. 2d 360, 362 (D. Conn. 2001) (clothes dryers); *Booth*, 166 F. Supp. 2d at 217 (fire allegedly caused by toaster oven); Pappas v. Sony Elec., Inc., 136 F. Supp. 2d 413, 415 (W.D. Pa. 2000) (television).

35. *See* Brooks v. Outboard Marine Corp., 234 F.3d 89, 92 (2d Cir. 2000).

36. *See* Miller v. Pfizer Inc., 196 F. Supp. 2d 1095, 1118 (D. Kan. 2002) (discussing Zoloft and excluding the testimony of plaintiff's expert, a psychologist and psychopharmacologist, on specific and general causation).

37. *See* Alexander v. Smith & Nephew, P.L.C., 98 F. Supp. 2d 1310, 1314 (N.D. Okla. 2000).

38. *See, e.g.*, Westberry v. Gislaved Gummi AB, 178 F.3d 257 (4th Cir. 1999) (determining whether inhaling talcum powder lubricant on gaskets aggravated sinus condition); Heller v. Shaw Indus., 167 F.3d 146 (3d Cir. 1999) (determining whether carpet caused respiratory illnesses); Mattis v. Carlon Elec. Prod., 114 F. Supp. 2d 888, 890 (D.S.D. 2000) (determining whether vapors from PVC cement caused reactive airways dysfunction syndrome).

II. QUALIFICATIONS AND SOURCES OF EXPERT WITNESSES

To serve as an expert witness, an individual must first be qualified—"by knowledge, skill, experience, training, or education"[39]—to offer opinions on the particular specialized matter before the court.[40] The bulk of experienced and otherwise qualified specialists in most fields of product design, manufacturing, and labeling are employed by private industry—by the very manufacturing enterprises who constitute the defendants in products liability litigation. Thus, because such persons are already in its employ, a manufacturer usually has little difficulty finding appropriate engineering and other experts to help defend a products liability case. Indeed, such experts may include the very persons who designed the accident product, advised on appropriate warnings, and designed and supervised the assembly process. Plaintiffs' lawyers, on the other hand, generally are limited to two principal resource pools for expert witness talent: universities and private consulting expert firms.[41]

III. THE RISE OF THE "PROFESSIONAL" EXPERT WITNESS AND THE PROBLEM OF "JUNK SCIENCE"

As products liability litigation began to mushroom in the late 1960s and the 1970s, so too did the plaintiff's need for experts to battle a manufacturer's engineers and other experts over issues of product defectiveness and causation—in expert reports, depositions, and ultimately at trial. Straining the pool of then-existing technical talent, a surge in demand for expert testimony in the 1970s and 1980s spawned a whole new industry of "professional" expert engineers and other consulting specialists who mostly, but not exclusively,[42] supported the plaintiff's bar. Many such

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39. *See* FED. R. EVID. 702.

40. *See, e.g.*, Goodwin v. MTD Prod., Inc., 232 F.3d 600 (7th Cir. 2000) (discussing a case involving a lawn mower that discharged a wing nut into plaintiff's eye; engineer was not qualified to give expert opinion on nature, scope, or cause of eye injury); Robertson v. Norton Co., 148 F.3d 905 (8th Cir. 1998) (discussing the explosion of a ceramic grinding wheel; ceramics engineer was not qualified to testify on adequacy of warnings); Polaino v. Bayer Corp., 122 F. Supp. 2d 63, 69 (D. Mass. 2000) (ruling that the chemist was not qualified to testify on defectiveness of x-ray chemical mixer); Alexander v. Smith & Nephew, P.L.C., 98 F. Supp. 2d 1310, 1315 (N.D. Okla. 2000) ("The simple possession of a medical degree is insufficient to qualify a physician to testify as to the advantages of a spinal fixation device, the medical causation of spine-related ailments, or the mechanical functioning of an orthopedic implantation device."); Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727, 833-35 (Wis. 2001) (ruling that a chemist not qualified to testify on whether latex gloves caused allergic reaction).

41. Sources for the latter include H. PHILO ET AL., LAWYERS DESK REFERENCE: TECHNICAL SOURCES FOR CONDUCTING A PERSONAL INJURY ACTION (9th ed. 2001), the ATLA Products Liability Exchange, *at* http://www.altanet.org (last visited Oct. 31, 2002), and Technical Advisory Service for Attorneys ("TASA"), an expert referral service, *at* http://www.tasanet.com (last visited Oct. 31, 2002). Among the many engineering and other expert consulting firms are Engineering Design & Testing Corp., *at* http://www.edtengineers.com (last visited Oct. 31, 2002), and Triodyne Inc., *at* http://www.infoserve@triodyne.com (last visited Oct. 31, 2002).

42. While manufacturers substantially rely on their own in-house technical experts, they frequently use outside consultants for accident reconstruction and the development of other proofs

experts were of course entirely competent to testify on the issues they agreed to evaluate. But others advertised a willingness to testify, for a fee, on the defectiveness (and even the appropriateness of punitive damages) of just about anything,[43] "from toys to airplanes."[44]

The very idea of a professional expert witness is problematic. "Expertise" in any field requires substantial time to accumulate and to stay abreast of current developments—by reading, experimenting, writing, perhaps teaching, and otherwise pursuing knowledge in the specialized field of study. The problem is that much of a professional expert's time is spent in courtrooms and preparing for trial rather than pursuing expertise. Moreover, because most professional experts are economically dependent on being retained by lawyers to testify that particular products were (or were not) defective and caused (or did not cause) particular injuries, they have a natural bias to arrive at conclusions that favor their employers. Without a steady moral compass—grounded in a personal reservoir of knowledge, judgment, and professional conviction—a professional witness will be tempted to tell the employing lawyer what the expert thinks the lawyer wants to hear, rather than what he or she needs to hear. Whether working for the plaintiff or defense, this temptation for professional witnesses to mold their findings and conclusions to make the case for their employer is persistent and strong; and it is insidious, in part because they may hide weaknesses in their testimony from their own employer.

The kind of twisted testimony[45] that too easily results from a hired expert's natural bias provides one explanation of why professional witnesses sometimes contradict themselves in different cases, a strategic Achilles heel which an opposing attorney may discover by diligent research. If the opposing attorney does not reveal such conflicting testimony until the trial, both the expert and the employing attorney will find themselves in the dreadful predicament of trying to explain the contradic-

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for trial. One such firm of engineering and scientific consultants drawn upon by defendants, at least in automotive products liability litigation, is Exponent.com, *at* http://www.Exponent.com (last visited Oct. 31, 2002).

43. *See, e.g.*, Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 333 (1985) ("[A] Ph.D. can be found to swear to almost any 'expert' proposition, no matter how false or foolish."); *see generally* Bernstein, *supra* note 24, at 119-23 (examining the seamy side of the expert witness business).

44. One "system safety and human factors enginee[r]," listed in a technical expert directory, is said to have testified "in over 100 cases with products ranging from toys to airplanes." *See* PRODUCTS LIABILITY AND TRANSPORTATION DIRECTORY 196 (1983). For problems with professional expert witnesses, see generally Douglas R. Richmond, *The "Professional Expert" Witness: Doctor Lichtor, I Presume?*, 17 J. PROD. & TOXICS LIAB. 197, 223 (1995) (arguing for a "cause of action for expert witness malpractice").

45. For one expert's primer on how to mislead a jury, see Sanchez v. Black Bros. Co., 423 N.E.2d 1309, 1320 (Ill. App. Ct. 1981) (excerpting a speech given by defendant's witness to engineering group on how to manipulate juries and obfuscate answers on cross examination).

tion on the spot. On occasion, professional witnesses knowingly provide false, perjurious testimony, which, if discovered, will likely devastate the party's entire case.[46]

The explosion of expert testimony in products liability litigation during the 1970s and 1980s, fueled by an expanding plaintiffs' bar fed by contingent fees, quite naturally led to a rather rapid increase of products liability lawsuits based on novel, untested, abstract, and occasionally quite fantastic theories of science and technology, propounded by "experts" who sometimes were dubiously qualified to testify on issues on which they claimed expertise. As products liability litigation during this period marched along, courts[47] and commentators,[48] always skeptical of this form of witness,[49] increasingly decried a perceived growth in abuses of expert testimony—of "junk science" run amok.[50]

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46. *See, e.g.*, Harre v. A.H. Robins Co., 750 F.2d 1501 (11th Cir. 1985) (reversing and remanding judgment for defendant because verdict based in part on perjured testimony by defense expert); *see also* Jenkins v. Gen. Motors Corp., 446 F.2d 377, 399 (5th Cir. 1971) (holding that trial court properly excluded evidence that one of plaintiff's experts was under indictment for perjury); *see generally* Richmond, *supra* note 44, at 223.

47. *See, e.g.*, Lamon v. McDonnell Douglas Corp., 576 P.2d 426, 435 (Wash. Ct. App. 1978) (Andersen, J., dissenting), *aff'd*, 588 P.2d 1346 (Wash. 1979).

48. The "junk science" concept was promoted and popularized by Peter W. Huber who worked for the Manhattan Institute, a conservative think-tank. *See, e.g.*, PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991) [hereinafter HUBER, GAILILEO'S REVENGE]; PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 333 (1985). For a powerful rebuttal, see Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637 (1993).

49. *See, e.g.*, Ferguson v. Hubbel, 97 N.Y. 507, 514 (N.Y. 1884) (stating that the expert witnesses' "opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted"); Lee M. Friedman, *Expert Testimony, Its Abuse and Reformation*, 19 YALE L.J. 247, 249 (1910) (noting "a constant complaining and mistrust on the part of judges, juries and lawyers of the expert witness").

50. *See* HUBER, GALILEO'S REVENGE, *supra* note 48, at 3.

> Junk science cuts across chemistry and pharmacology, medicine and engineering . . . . It is a catalog of every conceivable kind of error: data dredging, wishful thinking, truculent dogmatism, and, now and again, outright fraud.
>
> On the legal side . . . [is] a speculative theory that expects lawyers, judges, and juries to search for causes at the far fringes of science and beyond. The legal establishment has adjusted rules of evidence accordingly, so that almost any self-styled scientist, no matter how strange or iconoclastic his views, will be welcome to testify in court. The same scientific questions are litigated again and again, in one courtroom after the next, so that error is almost inevitable.
>
> Junk science is impelled through our courts by a mix of opportunity and incentive. "Let-it-all-in" legal theory creates the opportunity. The incentive is money: the prospect that the Midas-like touch of a credulous jury will now and again transform scientific dust into gold.

Id.; *see generally* Bert Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595, 597-98 & nn. 1-3 (1988) (arguing that the problems historically posed by scientific evidence are becoming increasingly difficult because an "expert witness can be found to support almost any decision").

IV. EARLY LIMITATIONS ON EXPERT TESTIMONY

At early common law,[51] the only real limitation on expert testimony was that the person proffered as an expert be qualified as an expert in the field. The courts generally allowed such experts to provide relevant testimony about technical matters as a matter of course: once a person was qualified as an expert, the judge simply admitted into evidence his or her relevant opinion testimony.[52] This liberal approach to expert testimony reflected the thought that the market from which an expert made a living had reliably tested the quality of that expertise.[53] While the marketplace test generally may have worked satisfactorily to permit expert determinations on whether a carriage maker or pharmacist acted with reasonable care in making a carriage or mixing a medicine, this test was unhelpful when applied to expert opinions about new science or technology, where an established market for such expertise did not yet exist.

This was the situation the Supreme Court faced in *Frye v. United States*,[54] in which the defendant in a murder case offered the results of an early polygraph test to show his innocence. In passing on the merits of a new form of science or technology, ruled the Court, the test is whether it is "sufficiently established to have gained general acceptance in the particular field in which it belongs."[55] Shifting the fulcrum of decision from the expert to the expertise,[56] the *Frye* "general acceptance" test tended to exclude testimony on cutting-edge science and technology since new ideas become accepted wisdom only over time. During the next half century, *Frye*'s general acceptance standard, although increasingly criti-

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51. On early expert testimony, see John M. Chapin, *Experts and Expert Testimony*, 22 ALB. L.J. 365 (1880); Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901); *see also* FAIGMAN ET AL., *supra* note 9; David L. Faigman et al., *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 CARDOZO L. REV. 1799, 1803-09 (1994) [hereinafter Faigman et al., *Crystal Ball*](concluding that a rigorous and thorough analysis of scientific data should be undertaken before admission into court); Stephan Landsman, *Of Witches, Madmen, and Products Liability: An Historical Survey of the Use of Expert Testimony*, 13 BEHAV. SCI. & L. 131, 133 (1995) (understanding that *Daubert* represents a step towards greater judicial control, yet raises questions about "the evenhandedness of heightened judicial scrutiny of proffered expert testimony").

52. *See* FAIGMAN ET AL., *supra* note 9, at 3-5.

53. "The assurance of expertise was implied by the expert's success in an occupation or profession that embraced that knowledge . . . . In effect, the marketplace determined whether valid knowledge existed by endowing it with commercial value." *Id.* at 4.

54. 293 F. 1013 (D.C. Cir. 1923).

55. *Frye*, 293 F. at 1014.

56. *See generally* Faigman et al., *Crystal Ball*, *supra* note 51, at 1805-09.

cized,[57] evolved into the prevailing test for admissibility of expert testimony.[58]

As modern products liability and other technical litigation expanded in the late 1960s and early 1970s, coincident with the debate over the Federal Rules of Evidence then under consideration, the *Frye* test suddenly became quite "trendy."[59] In 1975, the Federal Rules of Evidence were adopted, including Rule 702, which provided for the admission of scientific and technical evidence by a qualified expert if such testimony would "assist the trier of fact" (i.e., if it is helpful to the jury),[60] and Rule 703, which allowed an expert to rely upon facts and data "reasonably relied upon by experts" in the field.[61] Neither Rule 702 nor the Advisory Committee's comment on it made any reference to the *Frye* test, but most jurisdictions interpreted this rule to incorporate *Frye*'s general acceptance standard.[62]

During the 1980s and early 1990s, the logic and fairness of *Frye*'s general acceptance test came under increasing scrutiny as courts increasingly debated whether and to what extent this test might be consistent with Rule 702.[63] During this period, the courts struggled to find a balance between the need to open courtrooms to new science, on the one hand, with the problems from allowing experts to propound bad science, on the other. Increasingly, courts began to strike this balance by at least partially shifting the focus away from whether the science was "generally

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57. Criticisms often centered on its conservatism and its vagueness. *See, e.g.*, FAIGMAN ET AL., *supra* note 9, at 7-10 (examining criticisms of the *Frye* test).

58. *See* Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1204 (1980); Gerard Harrison, Comment, *Liars, Damn Liars, and Expert Witnesses, Unhelpful Approaches to Unreliable Scientific Testimony in the Third and Fifth Circuits*, 29 HOUS. L. REV. 1029, 1034 (1992).

59. *See* Harrison, *supra* note 58, at 1034-35. But not all courts and commentators approved of the general acceptance test of admissibility. *See* MCCORMICK, *supra* note 9, at 874-75 ("General scientific acceptance is a proper condition for taking judicial notice of scientific facts, but it is not a suitable criterion for the admissibility of scientific evidence.").

60. At the time, Federal Rule of Evidence 702 provided: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702 (2000). Rule 702 was amended in 2000 to reflect the holding in *Daubert*.

61. Federal Rule of Evidence 703, prior to the Dec. 1, 2000 amendments, provided: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible evidence." FED. R. EVID. 703 (2000).

62. *See* Faigman et al., *Crystal Ball*, *supra* note 51, at 1803-09.

63. *See generally* Harrison, *supra* note 58, at 1057 (arguing that proper interpretation of Rules 702 and 703 of the Federal Rules of Evidence provides courts with adequate tools "to regulate the admissibility of novel scientific evidence," thus making the *Frye* test unnecessary).

accepted," the *Frye* approach, to an evaluation of the methodology by which the expert reached his or her conclusion.[64]

V. *DAUBERT* AND ITS PROGENY

A. Daubert

In *Daubert v. Merrell Dow Pharmaceuticals*,[65] after several years of avoiding the issue,[66] the Supreme Court in 1993 finally decided to examine the admissibility of expert testimony on novel scientific theories and the relationship of the *Frye* test to Rule 702 of the Federal Rules of Evidence. *Daubert* involved the drug Bendectin, an anti-nausea medicine that, from 1956 until 1983, physicians widely prescribed to pregnant women for morning sickness.[67] From the first Bendectin case filed in 1979, which claimed that the drug had caused the plaintiff's missing and malformed fingers, nearly 2000 similar cases eventually were filed claiming damages for birth defects from the drug.[68] In *Daubert*, filed late in the life cycle of the litigation, the plaintiffs claimed that Benedictin administered to their mothers during pregnancy caused their birth defects.[69] The defendant moved for summary judgment, arguing that no causal link existed between Bendectin and birth defects.[70] In affidavits from its expert scientists, the defendant showed that none of the thirty-eight epidemiological studies of Bendectin published to date had found a

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64. *See, e.g.*, Christophersen v. Allied Signal Corp., 939 F.2d 1106, 1110 (5th Cir. 1991) (en banc) (stating that in order for an expert's scientific conclusions to be admissible, they must, *inter alia*, be based on "a well-founded methodology"); Brock v. Merrell Dow Pharm., Inc., 874 F.2d 307, 310 (5th Cir. 1989) (stating that difficult questions such as whether Bendectin caused birth defects compel courts to "critically evaluate the reasoning process by which the experts connect data to their conclusions in order . . . to consistently and rationally resolve the disputes before them"), *modified*, 884 F.2d 166 (5th Cir. 1989); United States v. Downing, 753 F.2d 1224, 1237 (3d Cir. 1985); *see generally* Harrison, *supra* note 58, at 1057 (arguing that examining an expert's methodology would make the *Frye* test unnecessary).

65. 509 U.S. 579 (1993).

66. See, for example, Justice White's dissents to the denial of certiorari in *Mustafa v. United States*, 479 U.S. 953, 953-54 (1986), and *Christophersen v. Allied Signal Corp.*, 503 U.S. 912, 912 (1992). Prior to *Daubert*, the *Frye* test, which had been used almost exclusively in criminal cases, was increasingly subject to criticism. *See* Gross, *supra* note 9, at 242-46.

67. *See* Green, *supra* note 9, at 661 (indicating that Bendectin was prescribed during the 1960s and 1970s to upwards of 25% of all pregnant women in the U.S.). On the Bendectin litigation, see MICHAEL D. GREEN, BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION (1996); JOSEPH SANDERS, BENDECTIN ON TRIAL: A STUDY OF MASS TORT LITIGATION (1998); Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1 (1993) [hereinafter Sanders, *From Science to Evidence*]; Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301 (1992); Gross, *supra* note 9, at 243-44 (summarizing the Bendectin litigation).

68. *See* Sanders, *From Science to Evidence*, *supra* note 67, at 4.

69. *See Daubert*, 509 U.S. at 579.

70. *Id.*

causal connection between birth defects and the drug.[71] In opposition, the plaintiffs offered affidavits from eight witnesses who concluded—on the basis of chemical structure analysis, in vitro (test tube) studies of animal cells, in vivo (live) animal studies, and a "reanalysis" of the previous epidemiological studies—that Bendectin could in fact cause birth defects.[72] Concluding that the plaintiffs' proffered expert evidence did not meet *Frye*'s "general acceptance" standard of admissibility, the district court granted the defendant's summary judgment motion, and the Ninth Circuit affirmed.[73]

In the Supreme Court, the petitioning plaintiffs argued that the Federal Rules of Evidence had superseded the *Frye* "general acceptance" standard.[74] Vacating and remanding, the Supreme Court agreed that the Rules do not allow a court to use the degree of acceptance of a subject of scientific testimony as the sole determinant of admissibility.[75] Because Rule 702 allows qualified experts to testify about "scientific . . . knowledge," the Court reasoned that a trial judge must determine that proposed expert testimony is both "scientific" and "knowledge"—that the subject of the testimony is "ground[ed] in the methods and procedures of science," that it is "derived by the scientific method."[76] An expert's proposed testimony must be "supported by appropriate validation – i.e., 'good grounds.'"[77] In short, expert testimony must be *reliable*.[78] In addition to requiring expert testimony be reliable, the Court further reasoned that Rule 702 requires that such testimony be *relevant*, since the rule demands that expert scientific or technical testimony "assist the trier of fact to understand the evidence or to determine a fact in issue."[79] This is the "helpfulness" requirement of Rule 702, requiring that expert testimony be sufficiently related to disputed facts to help the jury resolve facts or issues in dispute, a requirement that may be simply described as

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71. There are four common types of scientific studies used to determine the toxicity of a substance:

> [1] analyses of the chemical structure of the compound that focus on similarities between it and known toxins; [2] *in vitro* tests that examine its effects on human or animal cells that are cultivated in the laboratory for this purpose; [3] *in vivo* studies that test its effects on laboratory animals; and [4] *epidemiological* studies that examine its effects on human beings.

Gross, *supra* note 66, at 238. Epidemiological studies on large populations of humans are widely considered the most informative measure of toxic consequences of the substance. *Id.* at 238-39. "There is general agreement that epidemiological studies are the best and most informative, since only they provide direct evidence on the occurrence of pathologies in people." *Id.*

72. *See Daubert*, 509 U.S. at 579.

73. *See* Daubert v. Merrill Dow Pharm. Inc., 951 F.2d 1128 (9th Cir. 1991), *aff'g* 727 F. Supp. 570 (S.D. Cal. 1989).

74. *See Daubert*, 509 U.S. at 587.

75. *See id.* at 587-89.

76. *Id.* at 589-90.

77. *Id.* at 590.

78. *See id.* at 589-90.

79. *Id.* at 591.

"fit."[80] Thus, when a party proffers expert scientific testimony, the trial court must make a preliminary determination of both the (1) reliability (or validity), and (2) relevance (or fit) of the expert's reasoning or methodology underlying the testimony proposed.[81]

Among the factors a court may usefully employ in assessing the validity of an expert's proffered testimony on scientific evidence, the Court noted five:

> (1) *Testability*: whether the theory or technique is testable and has been tested – its ability to withstand objective, verifiable challenge and scientific trial;[82]
>
> (2) *Peer review*: whether it has been subjected to peer review and publication;
>
> (3) *Error rate*: whether it has an acceptable known or potential rate of error;
>
> (4) *Control standards*: whether its operation has been subjected to appropriate standards of control; and
>
> (5) *General acceptance*: whether it is widely accepted in the relevant scientific community.[83]

These are *Daubert*'s now-familiar reliability factors. In determining the admissibility of expert testimony under Rule 702, the Court emphasized that the inquiry into pertinent reliability considerations should be flexible, and that the focus of inquiry "must be solely on principles and methodology, not on the conclusions that they generate."[84] Because the lower courts had based their decisions in this case almost exclusively on *Frye*'s general acceptance standard, rather than on the broader reliability and fit

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80. *See id.* at 591-92.

81. *Id.* at 592-93. Thus, "a trial judge must evaluate the proffered testimony to assure that it is at least minimally reliable; concerns about expert testimony cannot simply be referred to the jury as a question of weight." Capra, *supra* note 9, at 701-02.

82. The Advisory Committee's version of this factor is more prolix: "whether the expert's technique or theory can be or has been tested – that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability." CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES 152 (2d ed. Supp. 2002).

83. *See id.* at 593-94. Although the Court lumps factors (3) and (4) together, which has led most observers to a four-factor count, the separation of these two different considerations clarifies analysis. The five-factor list is adapted from Capra, *supra* note 9, at 702, which is the basis for the formulation in FED. R. EVID. 702, advisory committee's note (2000 amendment).

84. *See Daubert*, 509 U.S. at 593-95.

requirements of Federal Rule of Evidence 702, the Supreme Court remanded the judgment to the Court of Appeals.[85]

B. Supreme Court Progeny

Since *Daubert*, the Supreme Court has revisited the expert testimony issue a number of times. In *General Electric Co. v. Joiner*,[86] a district court applied *Daubert* to exclude expert testimony that purported to link the plaintiff's exposure to PCBs to his lung cancer, and the court of appeals reversed.[87] Reinstating the district court's ruling, the Supreme Court emphasized that federal trial courts have wide discretion to exclude expert testimony, holding that such determinations are only subject to a permissive "abuse of discretion" standard of review.[88] The Court further noted that *Daubert*'s direction that courts focus on the expert's methodology in no way precluded a trial judge from scrutinizing the quality of the expert's conclusions.[89]

Next came *Kumho Tire Co. v. Carmichael*,[90] a tire blowout case involving a worn tire containing at least two punctures that previously had been inadequately repaired. In a suit against the tire manufacturer, the plaintiffs claimed, on the basis of deposition testimony of an expert in tire failure analysis, that the cause of the blowout was a defect in the tire rather than abuse.[91] Although the expert's testimony might have been viewed as "technical" rather than "scientific," the trial court applied the gatekeeping principles of *Daubert,* closely scrutinizing the reliability of the expert's hypotheses, methodology, and conclusions.[92] Concluding that they failed each of the *Daubert* factors, and that their reliability had not been established on any other ground, the district court excluded the expert's testimony and granted the defendant's motion for summary judgment.[93] The court of appeals reversed, ruling that *Daubert* applied

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85. On remand, applying the *Daubert* analysis, the Ninth Circuit ruled again that the district court had properly excluded the plaintiffs' expert testimony, concluding that the testimony of one of the plaintiffs' experts was not reliable and that the testimony of the others was not relevant because they would only testify that Bendectin is "capable of causing" birth defects, not that the drug *in fact* (more likely than not) caused the plaintiffs' birth defects. Daubert v. Merrell Dow Pharm. Inc., 43 F.3d 1311, 1321-22 (9th Cir. 1995).

86. 522 U.S. 136 (1997).

87. *See Joiner*, 522 U.S. at 140-41.

88. *Id.* at 141.

89. The Court remarked:

> [C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence, which is connected, to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion preferred.

Id. at 146.

90. 526 U.S. 137 (1999).

91. *Kumho Tire*, 526 U.S. at 142.

92. *See id.* at 145.

93. *Id.*

only to experts relying on "scientific" principles rather than on the kind of skill- or experience-based observation of the type relied upon by the plaintiff's expert.[94] Reversing the court of appeals, the Supreme Court held that Rule 702's broad reference to expert testimony on "scientific, technical, or other specialized knowledge" means that the *Daubert* gatekeeping principles apply to all expert testimony.[95] Further, the Court reaffirmed the flexibility of the reliability inquiry and noted that the trial court has wide latitude, subject only to review for abuse of discretion, to determine what reliability factors are appropriate to the particular expert testimony under examination.[96]

The final Supreme Court decision to date on expert testimony is *Weisgram v. Marley Co.*,[97] a wrongful death action against the manufacturer of a heater arising out of a house fire. On testimony by three experts that the heater was defective and that the defect caused the fire, the plaintiffs obtained a judgment on a jury verdict, over the defendant's objection that the testimony was unreliable and therefore inadmissible under Rule 702 and *Daubert*.[98] The court of appeals reversed, agreeing with the defendant that the plaintiffs' expert testimony offered mere speculation as to the heater's defectiveness, making it scientifically unsound.[99] Rather than remanding for a retrial, and reasoning that the plaintiffs had had a fair opportunity to prove their claim and so did not deserve a second chance, the court of appeals directed judgment for the defendant manufacturer.[100] The Supreme Court affirmed.[101] Rejecting an argument that a plaintiff might hold certain expert testimony in reserve to shore up the claim if the proffered expert testimony were to be found insufficient, the Court noted that *Daubert* put parties relying on expert evidence on notice of "the exacting standards of reliability" demanded of such evidence.[102] "It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail."[103] Reminding parties (usually plaintiffs) that they may well not get a second chance, *Weisgram* underscores *Daubert*'s basic message: parties bear responsibility for presenting expert testimony rigorously grounded in good science and technology and relevant to the particular issues in the case.

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94. *Id.*
95. *Id.* at 147-49.
96. *See id.* at 149-53.
97. 528 U.S. 440 (2000).
98. *Weisgram*, 528 U.S. at 455-56.
99. *Id.*
100. *Id.* at 446.
101. *Id.*
102. *Id.* at 455.
103. *Id.*

C. Amendment to Federal Rule of Evidence 702

In 2000,[104] the Supreme Court approved certain amendments to the Federal Rules of Evidence on opinion evidence and expert testimony to conform them to the principles of *Daubert* and its progeny.[105] In addition to making certain minor changes to Rules 701 and 703, the amendments added an important proviso to Rule 702 that permits expert testimony only if such testimony is grounded on "sufficient facts and data" and is the result of "reliable principles and methods" which are themselves reliably applied to the facts of the case.[106] The Advisory Committee's helpful Note to the 2000 amendment of Rule 702 observes that the amendment requires only that the data, principles, and methods used by an expert are reliable and reliably applied,[107] and that the quality of expert testimony still largely remains tested by cross-examination and the other safeguards of the adversary system.[108] Observing that "[a] review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule,"[109] the Committee Note adds that the amendment "is not intended to provide an excuse for an automatic challenge to the testimony of every expert."[110]

As for *Daubert*'s reliability factors, the Advisory Committee's Note reiterates *Daubert*'s five-factor list set forth above and further enumerates several additional factors courts have found useful in varying contexts:

> (1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying."
>
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
>
> (3) Whether the expert has adequately accounted for obvious alternative explanations.

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104. The amendments were effective Dec. 1, 2000, a quarter century after the Rules were first adopted in 1975.

105. *See generally* FED. R. EVID. 702 avisory committee's note (2000 amendment).

106. With the amended language italicized, Federal Rule of Evidence 702 now provides in full:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

FED. R. EVID. 702.

107. FED. R. EVID. 702 advisory committee's note (2000 amendment).

108. *Id.*

109. *Id.*

110. *Id.*

> (4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting."
>
> (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.[111]

While recognizing the importance of these and the original *Daubert* factors, the Advisory Committee observed that the amendment makes no attempt to "codify" the factors, which the Supreme Court has emphasized are not exclusive.[112] Instead, the new standards added to Rule 702 are "broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate."[113] In sum, the amendment (including the Committee Note) to Federal Rule of Evidence 702 does not provide a conclusive roadmap for each specific aspect of expert testimony, but it does provide helpful guidance on the fundamental *Daubert* reliability principles.[114]

D. Daubert *in the Lower Federal Courts*

Daubert has, as intended, forced courts to examine expert testimony more closely. Post-*Daubert*, the federal district courts, exercising their newly appointed "gatekeeper" function, have scrutinized expert testimony more closely, often holding rigorous pre-trial "*Daubert* hearings"—that are often outcome determinative—to determine the admissibility of proffered expert testimony.[115] But heightened judicial scrutiny of expert testimony does not mean that a court will necessarily exclude a plaintiff's expert testimony, even if it is unusual: the circuit courts sometimes affirm plaintiff verdicts in novel contexts in which the traditional scientific indicia of defectiveness or causation is marginal at best,[116] and they will reverse a district court for excluding a plaintiff's expert testi-

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111. *Id.* (internal citations omitted).

112. *Id.*

113. *Id.*

114. *Id.* Pointing to the Supreme Court's admonition that *Daubert*'s reliability factors are not exclusive, the Advisory Committee's Note observes that the amendments do not attempt to "codify" the factors but instead set forth standards that are "broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate." *Id.*

115. *See, e.g.*, Brasher v. Sandoz Pharm. Corp., 160 F. Supp. 2d 1291, 1295 n.12 (N.D. Ala. 2001); *see also* Rudlin, *supra* note 9, at 336.

> [T]he *Daubert* hearing and ruling have effectively become virtually as case outcome determinative as a class certification hearing and ruling: once decided, a case either shrivels up and goes away, or becomes more dangerous to try. *Daubert* hearings are often every bit as case dispositive, practically speaking, as a summary judgment hearing. Thus, practitioners whose cases rely in any material way on expert testimony must . . . be prepared for a full-blown *"trial within a trial"* that the *Daubert* hearing often becomes.

Id.

116. *See, e.g.*, Bonner v. ISP Tech., Inc., 259 F.3d 924, 927-28 (8th Cir. 2001) (affirming an award for an assembly line worker, who exposed to defendant's organic solvent, suffered psychological injuries, cognitive impairment, and Parkinsonian symptoms).

mony with excessive zeal.[117] But *Daubert* decisions frequently go the other way, excluding a plaintiff's expert testimony as unreliable or irrelevant. Thus, the lower federal courts have disallowed expert testimony on *Daubert* grounds because the expert proposed to testify on a novel causal theory, not generally accepted or subjected to peer review, that was developed only for the litigation;[118] relied too heavily on the temporal proximity of harm to its alleged cause;[119] failed sufficiently to inspect or test the accident product or a proposed alternative design;[120] failed

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117. *See, e.g.*, Lauzon v. Senco Prod., Inc., 270 F.3d 681, 691 (8th Cir. 2001) (recognizing that only three published articles supported expert's theory that bottom-fire pneumatic nailers are defective, but ruling that limited peer review is not fatal because such nailers are new product); Smith v. Ford Motor Co., 215 F.3d 713, 720-21 (7th Cir. 2000) (rejecting expert testimony on single ground of lack of peer review is abuse of discretion; no single factor is conclusive in determining reliability of expert's methodology); Kennedy v. Collagen Corp., 161 F.3d 1226, 1230 (9th Cir. 1998) (ruling that the trial court failed properly to consider the reasoning and methodology of plaintiff's expert).

118. *See, e.g.*, *Daubert*, 43 F.3d at 1313 (ruling, on remand, that testimony of plaintiff's experts, on link between Bendectin and birth defects, was not reliable or relevant); Grant v. Bristol-Myers Squibb, 97 F. Supp. 2d 986, 991, 992 (D. Ariz. 2000) (ruling that the conclusions of plaintiff's experts—that silicone breast implants cause various systemic diseases—was developed for the litigation, had not gained acceptance in the relevant scientific community, and that their scientific methods were not practiced by a recognized minority in the field); Nelson v. Am. Home Prod. Corp., 92 F. Supp. 2d 954, 972 (W.D. Mo. 2000) (ruling that none of plaintiff's experts had conducted independent research, outside context of litigation, on whether defendant's heart medication caused damage to optic nerve and vision).

119. *See, e.g.*, Heller v. Shaw Indus., Inc., 167 F.3d 146 (3d Cir. 1999) (ruling causation testimony unreliable when symptoms did not appear for two weeks after carpet was installed and remained after it was removed); Polaino v. Bayer Corp., 122 F. Supp. 2d 63, 70 (D. Mass. 2000) (ruling that expert's hypothesis, resting on temporal proximity rather than scientific principles, was classic illustration of fallacy of *post hoc ergo propter hoc*); Wynacht v. Beckman Instruments, Inc., 113 F. Supp. 2d 1205, 1209 (E.D. Tenn. 2000) (finding that expert opinion on causation based solely on temporal relationship was unreliable, given complex nature of facts and expert's failure to identify biochemical, medical, or toxicological basis for opinion). But the immediacy of acute symptoms to exposure may buttress the reliability of an expert's causation hypothesis. *See, e.g.*, *Bonner*, 259 F.3d at 931 (ruling strong temporal connection is sometimes powerful evidence of causation).

120. *See, e.g.*, Dhillon v. Crown Controls Corp., 269 F.3d 865, 870 (7th Cir. 2001) ("hands-on testing is not an absolute prerequisite to the admission of expert testimony, but the theory here easily lends itself to testing and substantiation by this method, such that conclusions based only on personal opinion and experience do not suffice"); Pride v. BIC Corp., 218 F.3d 566 (6th Cir. 2000) (noticing that defendant's expert subjected cigarette lighter that allegedly malfunctioned to replicable laboratory tests, but plaintiff's experts did not); Brooks v. Outboard Marine Corp., 234 F.3d 89, 91, 92 (2d Cir. 2000) (ruling that plaintiff's expert failed to test his theory that lanyard-activated kill switch would have disengaged motor boat engine under circumstances of accident to user's hand: "The failure to test a theory of causation can justify a trial court's exclusion of the expert's testimony."); Shanks v. Home Depot, Inc., No. 1:00-CV-383, 2001 U.S. Dist. LEXIS 22468, at *7 (W.D. Mich. Dec. 2, 2001) (finding examination, but no testing, of ladder for load-bearing capacity); Booth v. Black & Decker, Inc., 166 F. Supp. 2d 215, 215 (E.D. Pa. 2001); Berry v. Crown Equip. Corp., 108 F. Supp. 2d 743, 754 (E.D. Mich. 2000) ("courts interpreting *Daubert* have considered testability of the expert's theory to be the most important of the four factors, and this is especially true in cases involving allegations of defect in product design"); *Polaino*, 122 F. Supp. 2d at 68-69; LaBelle v. Phillip Morris, Inc., No. 2-98-3235-23 (D.S.C. July 5, 2001), at *11-13 (regarding no testing of supposedly safer cigarette design). *But see* Travelers Prop. & Cas. Corp. v. Gen. Elec. Co.,

faithfully to reconstruct the circumstances of the accident;[121] failed to provide a theory of causation supported by sufficient confirmatory studies;[122] failed to conduct a differential diagnosis to rule out alternative potential causes,[123] or applied such an approach improperly;[124] failed to show the relevance ("fit") of accepted principles to the plaintiff's case;[125] or otherwise failed to proffer reliable and relevant testimony—supported by reliable data, methods, or conclusions—that was likely to aid the trier of fact.[126] Quite often, an expert's testimony will fail *Daubert* scrutiny for many of these reasons.[127]

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150 F. Supp. 2d 360, 366, 367 (D. Conn. 2001) (ruling that although theory was not tested, it was capable of being tested; testimony admitted).

121. *See, e.g.*, J.B. Hunt Transp., Inc. v. Gen. Motors Corp., 243 F.3d 441, 444 (8th Cir. 2001); *Brooks*, 234 F.3d at 92.

122. *See, e.g.*, Glastetter v. Novartis Pharm. Corp., 252 F.3d 986, 992 (8th Cir. 2001) (ruling that proposed expert testimony was insufficient to show that Parlodel can cause intracerebral hemorrhages); Turner v. Iowa Fire Equip. Co., 229 F.3d 1202, 1208 (8th Cir. 2000) (ruling that the expert's differential diagnosis identified condition, not the cause); *Wynacht*, 113 F. Supp. 2d at 1209 (ruling that the treating clinical physician failed to explain in a scientifically reliable manner how wastewater discharge from lab analyzer caused plaintiff's respiratory, neurological, digestive, cardiovascular, and urinary problems that followed the discharge).

123. *See, e.g.*, *Turner*, 229 F.3d at 1208 (ruling that the expert made no attempt to exclude possible causes of respiratory problems, allegedly caused by accidental discharge of substance from fire suppression equipment, until only one remained); *see also* Schafersman v. Agland Coop, 631 N.W.2d 862 (Neb. 2001) (applying *Frye* test to facts, but adopting *Daubert* prospectively).

124. *See, e.g.*, *Glastetter*, 252 F.3d at 989 (ruling that although differential diagnosis is presumptively admissible, experts lacked basis for "ruling in" Parlodel, drug for suppressing postpartum lactation, as cause of stroke); Alexander v. Smith & Nephew, 98 F. Supp. 2d 1310, 1316 (N.D. Okla. 2000) (ruling that expert's failure to explain why he eliminated other possible causes rendered methodology unreliable); *see also* Katherine R. Latimer, *A Good Bedside Manner Wouldn't Be Enough, Either: Differential Diagnosis Under* Daubert, 1 EXPERT EVID. REP., 33 (2001); Joseph Sanders & Julie Machal-Fulks, *The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases: The Interplay of Adjective and Substantive Law*, 64 LAW & CONTEMP. PROBS. 107, 120-22 (2001).

125. *See, e.g.*, *Daubert*, 43 F.3d at 1321-22 (affirming, on remand, summary judgment for defendant in Bendectin birth defect case because plaintiff's experts could not testify that relative risk was more than the 2.0 necessary to show probability of causal connection); Cipollone v. Yale Indus. Prod., Inc., 202 F.3d 376, 380 (1st Cir. 2000) (ruling that expert's testimony on dangerously narrow gap between fixed and moving handrail of loading dock lift was based on supposition that person's hand was widened by holding object, but plaintiff was holding nothing when accident occurred); Rapp v. Singh, 152 F. Supp. 2d 694, 705 (E.D. Pa. 2001) (recognizing that crashworthiness experts rigorously analyzed how plaintiff's car was propelled under defendant's tractor trailer, but data was insufficient on how absence of vertical attachment to bumper made design defective); Groome v. Matsushita Elec. Corp. of Am., No. 92-CV-3073, 2000 U.S. Dist. LEXIS 4082, at *4-5, *7-8 (E.D.N.Y. Mar. 30, 2000) (ruling that where plaintiff's expert had to loosen safety switches to get microwave to operate with door open, his testimony that "it would be a 'very easy mistake' to install them improperly" did not "fit" because there was no factual basis for his opinion).

126. *See, e.g.*, *J.B. Hunt Transp. Inc.*, 243 F.3d at 441 (excluding testimony on crash theory by accident reconstructionist, based on photographs alone and dubious testimony of expert "foamologist"); Mitchell v. Gencorp Inc., 165 F.3d 778, 779 (10th Cir. 1999) (ruling on chemicals that allegedly caused leukemia); Cacciola v. Selco Balers, Inc., 127 F. Supp. 2d 175, 181-83 (E.D.N.Y. 2001) (ruling that, having neither inspected machine itself nor interviewed injured worker, the engineer's deposition testimony that machine's safety interlock switch was too

It may well be that the experts in each case in which the testimony was excluded propounded bad science, or perhaps the plaintiffs' attorneys simply failed to adequately prepare their experts on the *Daubert* requirements before the trial, or perhaps they failed at trial (or at a *Daubert* hearing) to provide the court with a sufficient offer of proof. Yet, the cases show that *Daubert* provides federal trial judges with a powerful operating manual for excluding expert testimony that, in the court's sound discretion, fails to meet current criteria for "good science."[128] There is indeed some logic to the view, suggested by the Supreme Court itself in *Daubert*,[129] that its ruling is balanced in its effect—that, while closing the door to testimony based on unreliable theories and methodologies, it opens the door to expert testimony on cutting-edge science and technology.[130] But the fact remains that only infrequently do courts invoke *Daubert* to exclude expert testimony proffered by defendants.[131] Instead, courts almost always apply *Daubert* principles (often with good reason) to exclude a plaintiff's experts and, hence, to bar the plaintiff's claim.[132]

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accessible, based on photographs alone, "rests upon unsubstantiated generalizations, speculative hypotheses and subjective evaluation that are based neither upon any professional study or experience-based observation").

127. *See, e.g.*, Oddi v. Ford Motor Co., 234 F.3d 136, 156-58 (3d Cir. 2000) (ruling that the "haphazard, intuitive inquiry" of plaintiff's expert engineer, who conducted no tests nor calculated forces involved in vehicle accident, failed each of eight reliability factors); Milanowicz v. Raymond Corp., 148 F. Supp. 2d 525, 537, 540 (D.N.J. 2001) (ruling that the testimony of consulting engineer on forklift truck design failed each of nine reliability indicia court reconfigured from *Daubert* for engineering cases).

128. *See, e.g.*, *Brooks*, 234 F.3d at 90, 92 (ruling expert testimony that outboard motor, propeller which injured plaintiff's hand should have been equipped with kill switch inadmissible because plaintiff's expert had never seen the boat or motor, either in person or in photographs; did not know boat's configuration or dimensions; had not spoken to boys involved in accident nor otherwise knew precisely how accident happened; nor attempted to reconstruct the accident to test his theory that a lanyard-activated kill switch would have disengaged motor under circumstances of accident); *Berry*, 108 F. Supp. 2d at 754 (ruling that even if proffered expert witness had been qualified to testify on forklift design safety, his opinions were "quite simply unsupported by any reasonable measure of technical data or foundation and are wholly unreliable"); *cf. Brasher*, 160 F. Supp. 2d at 1295 n.12 (noting a busy trial court's natural temptation to apply *Daubert* "heavy-handedly" to reduce a heavy caseload).

129. *See Daubert*, 509 U.S. at 595-97.

130. *See, e.g.*, *Bonner*, 259 F.3d at 928 (arguing that "[t]he first several victims of a new toxic tort should not be barred from having their day in court simply because the medical literature, which will eventually show the connection between the victim's condition and the toxic substance, has not yet been completed" (quoting *Turner*, 229 F.3d at 1209)).

131. *See, e.g.*, Harris v. Gen. Motors Corp., 201 F.3d 800, 801-02, 804 n.2 (6th Cir. 2000) (reversing summary judgment for defendant, granted on basis of affidavits of defendant's expert witnesses; on remand, proposed testimony of defendant's experts should be subjected to *Daubert* scrutiny); Edwards v. Safety-Kleen Corp., 61 F. Supp. 2d 1354, 1358 (S.D. Fla. 1999) (excluding defendant's and plaintiff's experts alike).

132. *See* LLOYD DIXON & BRIAN GILL, RAND INST. FOR CRIM. JUST., CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE DAUBERT DECISION 62 (2001) (summarized at http://www.rand.org/publications/RB/RB9037 (last visited Feb. 23, 2003)).

Booth v. Black & Decker, Inc.[133] provides an example of a court applying *Daubert* to exclude a plaintiff's expert testimony. The case involved claims of defective manufacture and design against the manufacturer of a toaster oven for negligence, breach of warranty, and strict liability in tort for fire damage to the plaintiffs' house.[134] Although the Fire Marshall determined that the fire was caused by a recently-repaired microwave that had been used shortly before the fire, the plaintiff's expert,[135] Thomas, determined that the fire originated in the defendant's toaster oven located in the same portion of the kitchen.[136] The defendant moved for summary judgment, which hinged on the admissibility of plaintiffs' expert testimony that the toaster oven was defective and caused the fire.[137]

The court held a two-day *Daubert* hearing on Thomas' qualifications and the reliability of his opinion that the toaster oven was defective and caused the fire.[138] The court first concluded that Thomas was qualified to offer expert testimony on the electrical aspects of consumer appliances, including toaster ovens, and that he was qualified to interpret the results of a scanning electron microscope examination he had conducted on the oven.[139] On the issues of manufacturing defect and causation, Thomas hypothesized that while someone was operating the toaster oven, its power contacts spontaneously welded together, causing the toaster oven to overheat and catch fire.[140] Attempting to confirm this hypothesis, Thomas testified that he used an electron microscope to examine the contacts, which showed indications of melting and scoring, suggesting to him that the surfaces had welded together.[141] The toaster oven was defectively designed, in Thomas' view, for two reasons: (1) because it lacked a thermal cut-off device, to cut off power when the oven reached a certain temperature, to prevent it from overheating, and (2) because it contained an excessive amount of plastic with a low melting point.[142]

Applying the Third Circuit's version of the *Daubert* factors,[143] the court ruled that the evidence failed to establish the reliability of Thomas'

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133. 166 F. Supp. 2d 215 (E.D. Pa. 2001).
134. *Booth*, 166 F. Supp. 2d at 217.
135. *Id.* at 222.
136. *Id.* at 217.
137. *Id.* at 216.
138. *Id.* at 217.
139. *Id.*
140. *Id.* at 219.
141. *Id.* at 218.
142. *Id.*
143. *See Oddi*, 234 F.3d at 145 (listing eight factors: the traditional five *Daubert* factors, plus "(6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness . . . ; and (8) the non-judicial uses to which the method has been put").

methodology.[144] Thomas' manufacturing defect theory was testable, but he had not attempted to get the power contacts of a similar toaster to weld together.[145] While his microscopic investigation was a form of test, he failed to adequately explain why indications of melting and scoring mean that welding has occurred, nor did he offer any other basis for his conclusion other than his personal experience and "broad and circular assertions that such markings simply are what happens when welding occurs."[146] Thomas asserted that his fire investigation methods were generally used by others in the field, but he failed to produce persuasive objective evidence to this effect.[147] Prompted by defense counsel, Thomas claimed that he followed the fire investigation guidelines of the National Fire Protection Association, but he did not point to any specific procedures in the guidelines that he had followed.[148] Nor did any credible evidence exist to establish that Thomas' examination method "was subject to peer review, had a known or potential rate of error, could be measured by existing standards, or was generally accepted."[149] In short, because Thomas "did not take sufficient care in supporting the credibility or reliability of the methodology he applied, despite the best efforts of counsel to elicit it," his testimony that the toaster contained a manufacturing defect was inadmissible.[150] Similarly, Thomas' design defectiveness theories, on which he offered no methodology whatsoever, were equally deficient: he neither sketched nor produced an example of the kind of thermal cut-off device he recommended, nor did he install one on an exemplar oven to test its ability to prevent overheating.[151] While he claimed that Black and Decker used such a device on an oven sold in Canada, he failed to produce the Canadian model.[152] As for his theory of excessive plastic materials, Thomas never explained how the plastic might have caused or affected the fire.[153]

Thus, whether or not Thomas in fact conducted a reasonable investigation into the cause of the fire, he failed to provide the court with "enough basic, objective information" on the reliability of the investigation and his opinions based thereon.[154]

> Thomas performed no tests of his own to determine whether his hypotheses were indeed true; he merely examined the toaster oven and

144. *See Booth*, 166 F. Supp. 2d at 219.
145. *Id.*
146. *Id.*
147. *Id.* at 220.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 221.
152. *Id.*
153. *Id.* at 219 n.4.
154. *Id.* at 221-22.

> concluded it could have been safer. His testimony . . . seemed wholly based on his own training and experience, and he provided the Court with no objective anchor for his conclusions.[155]

Based on a review of Thomas' expert reports, deposition testimony, and testimony during the *Daubert* hearing, the court found his causation inquiry to be "intuitive and haphazard, his methodology to be unreliable, and, consequently, his conclusions to be suspect."[156] Since the plaintiffs had failed to meet their burden of establishing the reliability of Thomas' testimony under the principles of Rule 702, *Daubert*, and *Kumho Tire*, Thomas' expert testimony on causation was inadmissible.[157] Because the plaintiffs had no other evidence to establish that a defect in the toaster oven probably caused the fire, the court granted summary judgment for the defendant.[158]

But *Daubert* seeks to exclude only invalid or irrelevant evidence, and even a rigorous application of its principles does not compel the exclusion of expert testimony that is merely inconclusive or otherwise only marginally helpful to the trier of fact. Many product accidents leave few and ambiguous clues of accident causation, especially if the product is severely damaged in the accident or lost thereafter,[159] and the issue of design defectiveness is by nature vague and indeterminate.[160] In such cases, courts should allow plausible expert hypotheses, provided they are based on sound methodology and reasoning, that attempt to reconstruct the origins of the accident and how it might have been prevented.

Rudd v. General Motors Corp.[161] is an example of a case that allowed a plaintiff's expert testimony after rigorous *Daubert* scrutiny. The plaintiff was injured when a fan blade on his pickup truck broke lose and struck him while he stood in front of the truck's open hood twisting the distributor housing to adjust the engine's timing.[162] Plaintiff sued the vehicle manufacturer, claiming that the fan blade had been made of defective metal, a claim based largely on the testimony of his expert, Edmondson, a mechanical engineer with extensive experience in failure

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155. *Id.* at 221.

156. *Id.*

157. *Id.* at 222.

158. *Id.* at 223. Nor would the malfunction theory help the plaintiffs, since even that theory required reasonable inferences that the particular product had malfunctioned and caused the harm. Because of the multiple possible causes of the fire in this case, expert testimony on causation was necessary on the malfunction theory, too. *Id.* at 220 n.5.

159. On the malfunction theory, see MADDEN & OWEN, *supra* note 9, § 7.12.

160. On design defectiveness, see generally MADDEN & OWEN, *supra* note 9, at ch. 8.

161. 127 F. Supp. 2d 1330 (M.D. Ala. 2001).

162. *Rudd*, 127 F. Supp. 2d at 1332, 1340.

analysis.[163] GM moved for summary judgment, arguing that the plaintiff had offered no admissible evidence of a manufacturing defect.[164]

Choosing not to hold a *Daubert* hearing,[165] the court ruled on the admissibility of Edmondson's testimony on the basis of his expert report and deposition testimony.[166] Edmondson found no direct evidence of a physical flaw in the fan blade, but arrived at his conclusion circumstantially by excluding other possible explanations of how the fan blade might have broken.[167] In particular, he first determined that the plaintiff's use of the vehicle at the time the fan blade broke was entirely proper: the plaintiff's technique in adjusting the timing, while running the engine at 1200 to 1500 rpms, was entirely normal and specifically recommended by GM's tune-up manuals.[168] Next, based on Edmondson's visual examination, his "total indicator reading" measurements of the accident fan and fan assembly, and his background reading, he determined that prior to the accident the fan blade had not been bent, at the site of the fracture origin or elsewhere, and that no visible damage to the blade existed that might have caused the fatigue fracture and break.[169] Had the fan blade been subjected to a sudden trauma during operation, Edmondson testified that it would have left physical indicia of the trauma, such as broken paint, scarring, or denting, none of which were visible.[170] The absence of any indications that the fan had encountered abnormal forces during operation led him to conclude that a microscopic manufacturing defect, such as a scratch, grind mark, gas bubble, or an inclusion caused a metal-fatigue fracture.[171] The court concluded that Edmondson's systematic elimination of alternative causes led to circumstantial proof of defectiveness that was *relevant* to a jury's determination of that issue.[172]

Although the *reliability* of the Edmondson's expert evidence was a closer question, the court concluded that it met each of the three specific reliability standards of new Rule 702—that it was based on (1) sufficient

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163. *Id.* at 1332, 1338.

164. *Id.* at 1339.

165. Normally, the decision whether to hold a *Daubert* hearing is entirely discretionary with the trial court. There may be no need for such a hearing if the parties have developed an extensive evidentiary record, including expert reports, depositions, and the literature that supports the expert opinions, and assuming that the issues are well briefed. *Id.* at 1334 n.3 (citing authorities); *see Nelson*, 92 F. Supp. 2d at 967; *Schafersman*, 631 N.W.2d at 877. As with any discretionary matter, however, a trial court's failure to hold a *Daubert* hearing in particular circumstances, whether or not requested by the losing party, may be an abuse of discretion, particularly if the admissibility issue turns on factual issues and will be determinative of summary judgment. *See* Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 418 (3d Cir. 1999).

166. *See Rudd*, 127 F. Supp. 2d at 1340.

167. *Id.* at 1342.

168. *Id.*

169. *Id.* at 1340.

170. *Id.* at 1341.

171. *Id.*

172. *See id.* at 1342.

data, (2) reliable principles and methods, and (3) reliable application of the methods to the facts.[173] First, the factual basis of Edmondson's testimony was sufficient—based on his visual inspection of the accident fan blade and other fans, his account of the use history of the truck and fan blade, his "total indicator reading" measurements, his reliance on two failure-analysis publications (which included a case study of a car fan fatigue fracture) and GM tune-up manuals, and his background and training analyzing metal fractures,[174] including automotive fan fatigue fractures.[175] Second, the court ascertained that Edmondson's method for determining the cause of the fatigue fracture—by eliminating ("ruling out") other possible causes—was a well-established and reliable scientific method for determining causation.[176] Moreover, because a specialty publication had employed the process-of-elimination method in a failure analysis model, which included a case history of a fatigue fracture in an automobile fan, this method further satisfied *Daubert*'s reliability factors on publication and acceptance within a relevant community of experts.[177] Third, and finally, the court found that Edmondson reliably applied this method to the accident fan—by determining that the fan's history did not include improper operation and by closely inspecting the fan blade metal for physical indicia of other causes.[178] Noting that Edmondson could not fairly be expected to assign a particular error rate to his techniques,[179] the court concluded that his testimony was reliable, and hence admissible, "because he provide[d] a step-by-step and transparent account" of "reasoning processes and data sources" on which he relied, "the physical indicia he associate[d] with each possible alternative cause, and his reasons for excluding each of the alternative causes."[180] By fully revealing the basis of his opinions, Edmondson's testimony thus supplied the defendant with a fair basis to challenge his opinions by cross-examination

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173. *Id.*

174. The court quoted the Advisory Committee Note to Rule 702 to the effect that an expert's *experience* (alone or "in conjunction with other knowledge, skill, training or education") may provide a sufficient foundation for the expert's testimony if the witness explains "how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *Id.* at 1336.

175. *Id.* at 1342-43.

176. *Id.* at 1343. In the medical context, experts quite often apply this well-accepted method for determining causation, called "differential diagnosis" (or "differential etiology"). *See generally* Brew, *supra* note 9, at 482-83 (stating that differential diagnosis, the process of "eliminating other possible causes, is an essential methodological component in establishing specific causation"); Sanders & Machal-Fulks, *supra* note 124 (focusing on "one of the more difficult causal issues in torts: the proof of specific causation in toxic tort suits . . . through a process the courts have called differential diagnosis").

177. *See Rudd*, 127 F. Supp. 2d at 1343.

178. *Id.*

179. *Id.*

180. *Id.* at 1344.

and the presentation of contrary evidence, the basic tools of the adversary process.[181]

E. Daubert *in the State Courts*

Because *Daubert* interprets Federal Rule of Evidence 702, it applies by its terms only to the federal courts. For this and other reasons, quite a few state courts, still trusting in *Frye* and other conventional rules governing the admissibility of expert testimony, have refused to adopt the *Daubert* principles.[182] Yet, prior to the Supreme Court's decision in *Daubert* in 1993,[183] many courts had already adopted reliability principles quite similar to *Daubert*'s, and since that time an increasing number of states have rejected *Frye* and swung over to the *Daubert* point of view.[184] In addition, a large majority of states have adopted codes of evidence patterned on the Federal Rules of Evidence, including Rule 702 upon which *Daubert* is based.[185] Moreover, to the extent that *Daubert*'s precepts are grounded in reasoned principles of logic and fair play for adjudicating disputes involving principles of science and technology, those precepts have a certain logical and moral power that is difficult for state courts to ignore. For these reasons, a growing number of state courts, very possibly a majority, have now adopted the *Daubert* principles of reliability and relevance for expert testimony.[186]

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181. *Id.*

182. As of 2002, roughly fifteen states still purport to follow *Frye*. Recent reaffirmations of *Frye* and rejections of *Daubert* include: Logerquist v. McVey, 1 P.3d 113, 134 (Ariz. 2000) (en banc, 3-2 decision); Byrum v. Super. Ct., No. B153001, LEXIS 3809, at *6 (Cal. Ct. App. Feb. 20, 2002); Donaldson v. Cent. Ill. Pub. Serv. Co., 767 N.E.2d 314, 323 (Ill. 2002); Kuhn v. Sandoz Pharm. Corp., 14 P.3d 1170, 1178 (Kan. 2000); Kansas City Southern Ry. Co., Inc. v. Johnson, 798 So. 2d 374, 382 (Miss. 2001); Krause, Inc. v. Little, 34 P.3d 566, 569 (Nev. 2001); Blum v. Merrell Dow Pharm., Inc., 764 A.2d 1, 2 (Pa. 2000). *See generally* Heather G. Hamilton, *The Movement from* Frye *to* Daubert*: Where Do the States Stand?*, 38 JURIMETRICS J. 201, 208 (1998) (stating that "by 1992 after the *Frye* heyday had passed states were poised for a new test," and as such, only four years later, "28 states either have adopted the *Daubert* standard, explicitly assimilated it as similar to a test already in place, or maintained a *Daubert*-like test without mentioning *Daubert*"); *States Move to* Daubert*, Even When They Say They're Stuck on* Frye, 2 EXPERT EVID. REP. 161 (2002) (noting that nineteen states and the District of Columbia still adhere to *Frye*) [hereinafter *States Move to* Daubert].

183. *See* Hamilton, *supra* note 182, at 209 (summing that "thirty-three states have adopted *Daubert* since the Supreme Court decided the case, while seventeen states continue to employ the *Frye* standard").

184. As of 1998, Hamilton counted thirty-three states that had adopted *Daubert*, to which tally at least two additional states must be added. *See* People v. Shreck, 22 P.3d 68, 77 (Colo. 2001) (replacing *Frye* test with *Daubert* reliability standards); Schafersman v. Agland Coop, 631 N.W.2d 862, 867 (Neb. 2001) (same).

185. Hamilton reported that, as of 1998, only Connecticut, Massachusetts, New York, and Pennsylvania had not adopted Rule 702, and noted that Massachusetts had adopted *Daubert* judicially. Hamilton, *supra* note 182, at 209. Note, however, that few, if any, states have yet adopted the December 2000 amendment to Rule 702 that explicitly incorporates the *Daubert* principles.

186. The counts of states vary wildly. *Compare* Hamilton, *supra* note 182, at 209 (counting thirty-three states embracing *Daubert* principles), *with States Move to* Daubert, *supra* note 182, at

CONCLUSION: THE LEGACY OF *DAUBERT*

In *Daubert* and its progeny, the Supreme Court attempted to bridge the yawning gap between how reality is perceived and described, and how problems are resolved, in science and the law.[187] In particular, the Court sought to improve the legitimacy of judicial determinations involving science and technology by forcing courts to rigorously scrutinize the foundations of an expert's scientific or technological opinions. This is a messy task that requires both courts and lawyers to do the kind of rigorous science they may have entered law to avoid.[188] By abandoning *Frye*'s "general acceptance" standard, which was based on the precept that courts should defer to scientific communities to decide for themselves whether a particular type of scientific approach should be recognized as useful, *Daubert* switched the basic responsibility for making such decisions to the courts, which on balance appears to make good sense. It is hard to gainsay the Court's decision that trial judges should serve as "gatekeepers" for expert testimony, as preliminary decision-makers of whether a qualified expert witness has devoted as much rigor, and has applied the same exacting methodologies, to the matter before the court as the expert devotes to his or her own professional projects.[189]

Daubert requires trial courts to look seriously at the quality of the science or technology of a witness proferred as an expert. Courts can no longer simply pass along to juries the principal task of determining the validity of expert testimony on difficult questions at the margin of established science. As door-closing rules governing the admissibility of expert testimony, the *Daubert* principles are capable of being applied oppressively to smother the judicial airing of legitimate disputes.[190] Instead, the courts need to apply the principles even-handedly—excluding expert

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161 (counting twenty-six), *with* FAIGMAN ET AL., *supra* note 9, at 12 n.8 (counting twenty-one). *See generally* Joseph G. Eaton, *Special Report:* Frye/Daubert *in the 50 States*, 30 PROD. SAFETY & LIAB. REP. 333, 338 (2002) (listing standards in every state).

187. For a smattering of cerebration on the perplexing borderland between law and science, see, for example, ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY (2001), Troyen A. Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation*, 73 CORNELL L. REV. 469, 472 (1988), and Heidi Li Feldman, *Science and Uncertainty in Mass Exposure Litigation*, 73 TEX. L. REV. 1, 4 (1995).

188. *See generally* Erica Beecher-Monas, *The Heuristics of Intellectual Due Process: A Primer for Triers of Science*, 75 N.Y.U. L. REV. 1563 (2000) (questioning courts' ability to comprehend genuine scientific inquiry).

189. *See* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999); FED. R. EVID. 702 advisory committee's note, supplemental reliability factor (4).

190. *See generally* Schafersman v. Agland Coop, 631 N.W.2d 862, 873-74 (Neb. 2001) (noting that while *Daubert* may be more lenient in that it allows more novel science into evidence, the test "can also require a more exacting, expensive, and time consuming foundation"); Capra, *supra* note 9, at 705 (noting that "despite all the focus on aggressive gatekeeping, the practical impact of *Daubert* is open to question"); Michael H. Graham, *The* Daubert *Dilemma: At Last A Viable Solution?*, 179 F.R.D. 1, 7 (1998) (noting that the "Supreme Court sought to encourage liberal admissibility by abolishing a strict *Frye* test").

testimony insufficiently grounded in sound methodology, while allowing such testimony that reasonably if boldly reaches into uncharted waters of evolving knowledge.[191] By requiring experts to provide reasoned bases for their opinions, and by requiring that such opinions be relevant to the legal issues in the case and grounded in reliable methodology, the reliability and relevancy principles of *Daubert*, used properly, provide a firm foundation for the fair and rational resolution of the scientific and technological issues which lie at the heart of products liability adjudication.

191. Moreover, trial judges must conduct their *Daubert* duties impartially and avoid giving an appearance that they disbelieve a party's expert witnesses. *See, e.g.*, Price v. Blood Bank of Del., Inc., 790 A.2d 1203, 1210 (Del. 2002).

BIG BROTHER AT THE DOOR: BALANCING NATIONAL SECURITY WITH PRIVACY UNDER THE USA PATRIOT ACT

PATRICIA MELL†

INTRODUCTION

> *The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it; moreover, so long as he remained within the field of vision which the metal plaque commanded, he would be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment.*
>
> –from *1984*, by George Orwell, originally published in 1949[1]

In the futuristic world created by George Orwell, there is no personal privacy. Citizens are watched and tracked every minute of the day by the government.[2] They are told that such surveillance is necessary to keep them safe from the enemies of the state.[3] The citizens are led to believe that the uncertainties and insecurities of an open democracy warrants protection of their physical security and freedom from military aggression by the ever present and ever watchful eye of Big Brother—the government.[4] In this futuristic world, homogeneity of thought and action are safe.[5] Divergent views or attitudes are quickly squelched by the government and declared a threat to the security of the state.[6] This futuristic

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1. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 4 (Alfred A. Knopf, Inc. 1992) (1949).
2. *See id.* at 3, 26.
3. *See id.* at 26.
4. *See id.*
5. *See id.*
6. *Id.*

world created by George Orwell has been dismissed by some as "science fiction."[7]

Advances in computer and surveillance technology, as well as the growth of Internet use, have combined to make the constant surveillance of Orwell's novel a possibility. Many street intersections sport video cameras in the attempt to monitor traffic violators.[8] Thermal imaging[9] and spy satellites make it possible to observe the interior happenings of the home. Telephone, e-mail, Internet activity, and all other manners of electronic communication can be monitored.[10] Biometrics methods can be used to identify and track an individual's movement in society.[11] In addition, it has been suggested that a National Identification Card be instituted as a means of monitoring travel patterns.[12] Many of these methods can be used without an individual's knowledge.[13] Today's technology has the potential to eliminate the area in which an individual can legitimately declare privacy from the intrusion of the government. If allowed to do so, the very fabric of our democratic society will change.

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7. In the 1998 movie *Enemy of the State*, the surveillance techniques of Orwell's world were shown to be science fact. ENEMY OF THE STATE (Touchstone Pictures 1998). In that movie, a "Winston-like" character, played by Will Smith, discovered how little privacy the individual had at the hands of unscrupulous government figures. *Id.*

8. In August 2001, Congress debated the constitutionality of cameras designed to catch traffic offenders. 2001 Burrelle's Information Services, CBS News Transcripts, *CBS Morning News* (CBS television broadcast, Aug. 1, 2001). At that time, only fifty cities in the United States had installed surveillance cameras at traffic intersections. *Id.*

9. *See id.*

10. The Electronic Communications Privacy Act was a 1986 amendment to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which governed wiretaps. *See* 18 U.S.C. §§ 2511–20 (2000). The amendment extended the protections of Title III to the Internet and other digital technologies. *See id.* The following statement appears in the legislative history of the bill:

> If Congress does not act to protect the privacy of our citizens, we may see the gradual erosion of a precious right. Privacy cannot be left to depend solely on physical protection, or it will gradually erode as technology advances. Additional legal protection is necessary to ensure the continued vitality of the Fourth Amendment.

Report of the Committee on the Judiciary on the Electronic Communications Privacy Act of 1986, H.R. REP. NO. 647, 99th Cong., 2d Sess. 16-19 (1986).

11. Dana Hawkins, *Body of Evidence*, U.S. NEWS AND WORLD REP., Feb. 18, 2002, at 60.

> The new technologies establish a person's identity based on distinctive physical features. Most include a scanner or camera and software for analyzing the images extracting key features and digitizing the information. The system can then check the digital biometrics against a database to verify identity. Some features such as the iris are distinctive enough to allow a system to pick out one person among millions. Others such as hand proportions are less powerful but still useful for verifying identity.

Id. Each method has benefits and failings. *Id.* The methods include: digital finger scan, hand scan, face scan, iris scan, and signature and voice scan. *Id.*

12. *See* Mike France et al., *Privacy in an Age of Terror*, BUS. WEEK, Nov. 5, 2001, at 82.

13. *See* David Banisar, *Big Brother Goes High-Tech*, COVERT ACTION Q., *available at* http://mediafilter.org/caq/CAQ56brother.html (last visited Nov. 11, 2002).

The United States Constitution does not explicitly guarantee the right to privacy.[14] However, the framers of the Constitution created the Fourth Amendment to be the guardian of American civil liberties.[15] By ensuring freedom from unreasonable governmental intrusion, the Bill of Rights guaranteed core principles.[16] In combination with the First and Fifth Amendments, "the Fourth Amendment safeguard[s] not only privacy and protection against self-incrimination, but [also] conscience and human dignity and freedom of expression as well."[17] Supported by a range of procedural and substantive guidelines, the balance was maintained between the government's authority to regulate activity and the individual's freedom of thought and action.[18]

The weakening of the Fourth Amendment threatens these fundamental values. Unfortunately, recent circumstances have made it neces-

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14. In addition to the Fourth Amendment, there are several federal statutes that protect the privacy of the individual in specific contexts. These include the Privacy Act of 1974, 5 U.S.C. § 552a (2000) (giving individuals the right to request access to records about themselves and to prevent agency disclosure of personal information to third parties without consent); the Computer Matching and Privacy Protection Act of 1988, 5 U.S.C. § 552a(o) (2000) (amending the Privacy Act to limit the collection of information from individuals and providing guidelines for matching data about the same individual between agencies); the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa(b) (2000) (establishing guidelines for the police in obtaining information from newspapers); the Right to Financial Privacy Act of 1978 (FPA), 12 U.S.C. §§ 3401-22 (2000) (regulating the manner that the government gains access to bank records about individuals; FPA was amended by the Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act [hereinafter USA PATRIOT Act], Pub. L. No. 107-56, § 505b, 115 Stat. 272, 365 (2001)); the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g (2000) (limiting disclosure of student records to third parties without the subject's permission; FERPA was amended by the USA PATRIOT Act, Pub. L. No. 107-56, § 507, 115 Stat. 272, 367); the Fair Credit Reporting Act of 1970 (FCRA), 15 U.S.C. §§ 1681-1681v (2000) (limiting the disclosure of consumer reports, or investigative consumer reports, to third parties (e.g. government or other users) by consumer reporting agencies; FCRA was also amended by the USA PATRIOT Act, Pub. L. No. 107-56, § 505c, 115 Stat. 272, 365); and the Video Privacy Act, 18 U.S.C. § 2710 (2000) (preventing videotape service providers from disclosing personally identifiable information concerning an individual's tape selection to third parties). For a discussion of these statutes and the nature of the privacy interests protected, see Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight*, 11 BERKELEY TECH. L. J. 1 (1996).

15. "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'" United States v. U.S. Dist. Court, E.D. Mich., 407 U.S. 297, 314 (1972).

16. In this article, privacy will be used to describe freedom from governmental intrusion as protected by the Fourth Amendment of the United States Constitution. "[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." Katz v. United States, 389 U.S. 347, 350 (1967).

17. Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting). The Court, on numerous occasions, has recognized the historical interdependence between the rights that are protected in the First, Fourth, and Fifth Amendments. *See* Stanford v. Texas, 379 U.S. 476, 482-86 (1965); Marcus v. Search Warrants of Property at 104 E. Tenth St., Kansas City, Missouri, 367 U.S. 717, 724-29 (1961); Boyd v. United States, 116 U.S. 616 (1886).

18. *See* discussion *infra* Section I., and text accompanying notes 33-145.

sary for us as a nation to critically assess our resolve to maintain these values. On September 11, 2001, we witnessed in horror the terrorist attacks in New York and Washington, D.C. The crash of the plane in Pennsylvania still causes doubt as to the alleged target. On the ground, in the air, and in the aftermath of these acts, thousands of people lost their lives.[19] Along with the loss in human life, this nation lost its sense of safety and security within its borders.

The government reacted quickly to the crisis with the passage of a comprehensive act designed to assist law enforcement officials in detecting terrorists.[20] The legislation is known as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act" or "PATRIOT Act").[21] On October 26, 2001, President George W. Bush signed the PATRIOT Act into law.[22]

The PATRIOT Act is unprecedented in its amendment to provisions that had previously checked the ability of the government to observe everyday activities and obtain personal information about citizens.[23] The

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19. One year after the terrorist attack, the death toll was reported at 2,823. Brian Reade, *9/11: Stats and Quotes*, THE MIRROR, Sept. 11, 2002.

20. The USA PATRIOT Act was passed within seven weeks of the terrorist attacks. Thomas Legislative Service, *Bill Summary & Status for the 107th Congress*, *at* http:thomas.loc.gov/cgi-bin/bdquery (last visited Feb. 28, 2003). On October 2, 2001, the House introduced H.R. 2975, the Uniting and Strengthening America ("USA Act") Act of 2001. *Id.* The Senate introduced companion anti-terrorism legislation on October 4th—S. 1510, the Uniting and Strengthening ("USA Act") Act of 2001. *Id.* On October 11th, the Senate passed its anti-terrorism bill, followed by House passage of its version on October 12th. On October 23rd, H.R. 3162, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act") was introduced in the House, which incorporated provisions of both the House and Senate passed anti-terrorism bills. *Id.* On October 24th, the USA PATRIOT ACT passed both houses of Congress by an overwhelming majority: in the House by a vote of 357-66, and in the Senate by a vote of 98-1. *Id.* The President signed it into law two days later on October 26th. *Id.*

21. USA PATRIOT Act, Pub. L. No. 107-56, § 1, 115 Stat. 272, 272-75. The 116 pages of the USA PATRIOT Act are divided into ten sections designated as titles. Each title deals with the enhancement of a different set of criminal and civil law enforcement. Title I – Enhancing Domestic Security Against Terrorism; Title II – Enhanced Surveillance Procedures; Title III – International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001; Title IV – Protecting the Border; Title V – Removing Obstacles to Investigating Terrorism; Title VI – Providing for Victims of Terrorism, Public Safety Officers, and Their Families; Title VII – Increased Information Sharing for Critical Infrastructure Protection; Title VIII – Strengthening the Criminal Laws Against Terrorism; Title IX – Improved Intelligence; Title X – Miscellaneous. Despite its title, several of the provisions of the Act are not restricted to curtailing terrorism. Instead, many provisions are permanent changes to the criminal justice system in the United States. *See, e.g.*, USA PATRIOT Act, Pub. L. No. 107-56, § 371c, 115 Stat. 272, 337 (creating a criminal offense called "bulk cash smuggling").

22. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272.

23. The USA PATRIOT Act does make some changes needed to keep law enforcement techniques current with changes in technology; however, these changes have little to do with terrorism. *See id.* § 816, 115 Stat. 272, 385 (establishing cybersecurity forensic training for law enforcement).

fact that it does so in such a potentially oppressive manner has not quite hit the consciousness of the American people.[24] Privacy, in the sense of freedom from governmental intrusion, is a necessary foundation for the free exercise of democracy. However, privacy remains an abstract concept for the majority of Americans.[25]

By contrast, the horror of watching airplanes ramming into the World Trade Center and the Pentagon was concrete. Thus, Americans perceived that drastic measures were needed to prevent new attacks and restore the sense of security rocked by September 11th. The government responded to this perceived need with the PATRIOT Act.[26]

The PATRIOT Act attacks the balance between the government and the individual by a systematic circumvention of established doctrine and procedures guarding against unreasonable governmental intrusion.[27] It expands the realm of foreign surveillance into the domestic arena.[28] It removes many instances of judicial oversight from the system and threatens basic notions of freedom. It supersedes federal privacy protection laws and creates new crimes that may impact the Bill of Rights.[29] In many ways, it has repealed traditional notions of checks and balances between the executive, judicial, and legislative branches of the government.[30] This new standard of executive branch license, combined with a

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24. Several of the provisions of the Act were challenged by a coalition of right and left wing Congressmen and special interest groups. Attorney General Ashcroft derided them in his testimony before the Senate Judiciary Committee in December 2001. *Dep't of Justice Oversight: Preserving our Freedoms While Defending Against Terrorism: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (2001) (statement of John Ashcroft, Attorney General of the United States). He stated, "to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends." *Id.* The statement has the unfortunate effect of giving credence to civil libertarians who value free speech.

25. Members of various minority groups may disagree, pointing to obsessive use of police power in such things as traffic stops on less than probable cause, i.e. "driving while black." *See* Adero S. Jernigan, *Driving While Black: Racial Profiling in America*, 24 LAW AND PSYCHOL. REV. 127 (2000). Even in these instances, however, there are procedures that redress the government's abuses. *See* State v. Soto, 734 A.2d 350, 352 (N.J. Super. Ct. Law Div. 1996) (granting a motion to suppress evidence seized pursuant to the traffic stops of seventeen African-American males stopped for minor traffic offenses; the court found prima facie evidence of racial discrimination on the part of the state police).

26. The stated purpose of the USA PATRIOT Act is "[t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes." USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (introductory text).

27. *See generally* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272.

28. *See* discussion *infra* note 32 on the Foreign Intelligence Surveillance Act.

29. *See id.*

30. Although expressing some reservations, the pressing nature of the terrorist attacks may have made some members of Congress less willing to object to some of the provisions of the USA PATRIOT Act. Senator Russ Feingold (D-Wis.) was heard to complain that by naming the bill the USA PATRIOT Act, members of Congress were being subtly coerced into voting for it or risk being branded unpatriotic. Heather Forsgren Weaver, *Balance Sways Between Privacy, Security Concerns*, RCR WIRELESS NEWS, Feb. 4, 2002, *available at* http://rcrnews.com/cgi-bin/search.pl.

Fourth Amendment weakened by advances in surveillance technology, could extinguish privacy under the Fourth Amendment and dramatically change the nation.[31]

This article is an assessment of some provisions of the PATRIOT Act and its severe retrenchment of the privacy protected by the Fourth Amendment. It reviews some of the established protections that balanced the government's ability to intrude into the individual's sphere of privacy. This article also compares the traditional distinctions made between the heightened privacy protection standard under the Fourth Amendment for domestic criminal investigations with the lowered standards accepted for investigations performed for the collection of foreign intelligence under the Foreign Intelligence Surveillance Act ("FISA"), which figures so prominently in the PATRIOT Act.[32] Finally, this article examines some provisions of the PATRIOT Act as they impact these privacy protections.

I. THE PRE-PATRIOT ACT SCHEME OF CHECKS AND BALANCES UNDER THE FOURTH AMENDMENT AS PROTECTION OF PRIVACY

A. *The Legitimacy of the Individual's Subjective Expectation of Privacy Under the Fourth Amendment*

> *The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.*[33]

While the Constitution does not specifically designate a right to privacy, the basic purpose of the Fourth Amendment has been to "safeguard the privacy and security of individuals against arbitrary invasions by

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31. *See generally* ALAN WESTIN, PRIVACY AND FREEDOM (1967). A warning concerning the effects of technology on the Fourth Amendment was given in *Olmstead v. United States*, 277 U.S. 438, 465-66 (1928).

32. The Foreign Intelligence Surveillance Act ("FISA") was enacted to provide guidelines to the Central Intelligence Agency ("CIA") for the collection of intelligence on the activities of foreign powers. 50 U.S.C. §§ 1801-11 (2000). FISA was the Congressional response to a Senate report documenting the flagrant unconstitutional surveillance perpetrated by governmental agencies on domestic organizations critical to the administration. *See* discussion on Church Committee Report, *infra* note 284. Before its amendment by the USA PATRIOT Act, FISA allowed surveillance pursuant to a warrant based on probable cause that the purpose of the surveillance was the gathering of foreign intelligence information. 50 U.S.C. §§ 1804-05. There were very narrowly proscribed circumstances for domestic surveillance. *See* United States v. Squillacote, 221 F.3d 542, 553 (4th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001). Special courts were established to hear applications for FISA surveillance. 50 U.S.C. § 1803.

33. U.S. CONST. amend. IV.

governmental officials."[34] It has balanced the government's exercise of its police power with the individual's right to be free from unreasonable intrusions by the government.[35] The Fourth Amendment did not abolish the government's power to conduct searches of private residences or to seize papers found within. Instead, it imposed a reasonableness requirement upon governmental searches.[36] Requiring a warrant, as a condition precedent to a search, added judicial supervision to the government's exercise of its prerogative to intrude into the individual's private areas.[37] The probable cause standard gave judges a measure by which to decide the appropriateness of the warrant and provided additional insurance that groundless searches would not be allowed.[38]

The framers of the Constitution took great pains to provide a system of checks against governmental action because of their own experiences with the unreasonable and arbitrary searches performed by the English colonial government's officials.[39] Through the writ of a general warrant and writs of assistance, the English government had the power to search *any place* for *any thing*.[40] The use and abuse of such writs by the English militia in colonial America was at the basis of the Fourth Amendment's broad grant of protection to the people.[41]

Both the warrant clause and reasonableness clause of the Fourth Amendment acted as buffers between the government and the individual.[42] However, the Framers did not mean for the individual's privacy to be absolute.[43] The individual's private realm would suffer shifting bor-

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34. Johnson v. United States, 333 U.S. 10, 14 (1948). *See supra* note 14 for a list of some of the federal statutory protections afforded to individuals.

35. "The Warrant Clause has stood as a barrier against intrusions by officialdom into the privacies of life." United States v. U.S. Dist. Court, E.D. Mich., 407 U.S. 297, 332 (1972) (Douglas, J., concurring).

36. *See* Katz v. United States, 389 U.S. 347, 353 (1967).

37. The requirement that the warrant be issued by a neutral and detached magistrate has its basis in English common law. "[W]here practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation. Inherent in the concept of a warrant is its issuance by a 'neutral and detached magistrate.'" *U.S. Dist. Court, E.D. Mich.*, 407 U.S. at 316.

38. *See* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 94, 95 n.61 (1937).

39. In Colonial America, the British would search the colonists' homes for evidence of contraband and treason against the crown. *See generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1 (1st ed. 1978).

40. *See* Boyd v. United States, 116 U.S. 616, 622-23 (1886).

41. *See* LASSON, *supra* note 38, at 80; *see also* Entick v. Carrington, 19 Howell's State Trials 1029, 1034 (1765) (describing the search of plaintiff's house under a general warrant).

42. *See* LAFAVE, *supra* note 39, §§ 1.1, 3.1 for a discussion on the operation of these clauses of the Fourth Amendment.

43. *See Katz*, 389 U.S. at 350. It was later suggested that the states might be better able to develop more expansive protections of individual privacy. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490 (1977) ("State

ders as the courts reinterpreted the permissible sphere of privacy before society's varying needs. Advances in technology combined to shrink the shield of the Fourth Amendment as a protector of privacy. With each advance in surveillance technology, the Supreme Court adjusted its analysis to reflect what it considered to be the legitimate sphere of privacy acceptable to society.[44] Determining the appropriate balance between the individual's privacy and the government's power to intrude upon said privacy is one of the most litigated concepts under the Constitution.[45]

B. Surveillance and Fourth Amendment Protection Before the PATRIOT Act

Boyd v. United States[46] was the first case to assess the modern parameters of the Fourth Amendment. It reflected the nineteenth century notion of a very broad sphere of personal privacy.[47] The United States Supreme Court held the manner of intrusion to be irrelevant to the privacy being protected.

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, . . . it is the invasion of this sacred right which underlies and constitutes the essence of [the Fourth Amendment].[48]

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constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."); *cf.* Camara v. Mun. Court, 387 U.S. 523, 528 (1967) (upholding a warrantless search by a city building inspector acting under a city ordinance); Tracey Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?*, 25 AM. CRIM. L. REV. 669, 720, 726 (1988) (discussing whether a warrant requirement would impair the state's "special interests" by interfering with the state's probation system).

44. A thorough review of the changing analysis of Fourth Amendment cases by the Supreme Court is beyond the scope of this article. For that review, see Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1175-76; Silas J. Wassertrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19 (1988).

45. "[I]t is beyond question that the Fourth Amendment has been the subject of more litigation than any other provision in the Bill of Rights. Indeed, I would be willing to wager . . . that . . . lawyers and judges have spilled more words over the Fourth Amendment than all of the rest of the Bill of Rights taken together." LAFAVE, *supra* note 39, at v; *see also* Jeffrey J. Skelton, *Infrared Imaging Technology: Threatening to See Through the Fourth Amendment*, 29 IND. L. REV. 231, 234 n.23 (1995).

46. 116 U.S. 616 (1886).

47. *See* LASSON, *supra* note 38, at 107-10.

48. *Boyd*, 116 U.S. at 630.

Boyd also fixed the outer perimeter of modern Fourth Amendment analysis.[49] It established the principle that the Fourth Amendment applied to "all invasions on the part of the government and its employees [and was not limited to] a man's home, [but encompassed all the] privacies of life."[50] It is not surprising that the broad scope of Fourth Amendment protection granted in *Boyd* was to be restricted in the face of the problems of fighting crime.[51]

Olmstead v. United States[52] was a severe retrenchment of privacy protection under the Fourth Amendment. The case ushered in a balancing approach of individual privacy versus society's need to fight crime using the new technology of wiretaps.[53] In *Olmstead*, the majority determined that the Fourth Amendment protection against governmental intrusion could only be based upon a physical intrusion into the allegedly private space and applied to "material things – the person, the house, his papers, or his effects."[54] Since the wiretap and "capture" of the telephone conversations were not physical evidence, "[t]here was no searching[,] [t]here was no seizure. . . , [t]here was no entry of the houses or offices of the defendants."[55] Thus, the Fourth Amendment did not apply to government wiretaps.

In his dissent, Justice Brandeis predicted the wave of technological advancement and its encroachment upon the individual's right to privacy.[56] As one of the first defenders of the right to privacy, Brandeis viewed the Fourth Amendment as giving citizens protection against

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49. *See id.* at 622-38; *see also* Agnello v. United States, 269 U.S. 20, 35 (1925) (holding that evidence of unlawful seizure is not admissible); Gouled v. United States, 255 U.S. 298, 309, 311-12 (1921) (holding that property seizure in a lawful manner may be admissible); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (concluding that evidence obtained in an improper way is not admissible and shall not be used); Weeks v. United States, 232 U.S. 383, 393, 398 (1914) (holding that the trial court erred in admitting and using evidence that was illegally obtained by a United States marshal).

50. *Boyd*, 116 U.S. at 630.

51. *See generally* Wayne R. LaFave, *The Present and Future Fourth Amendment*, 1995 U. ILL. L. REV. 111 (1995) (discussing judicial interpretation of the Fourth Amendment by the United States Supreme Court); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977) (analyzing the broad shifts in legal thought affecting the United States Supreme Court's view on individual rights and how those shifts have affected the Fourth and Fifth Amendments); *The Life and Times of* Boyd v. United States *(1886-1976)*, 76 MICH. L. REV. 184 (1977-78) (discussing changing societal and judicial notions of property and privacy since the United States Supreme Court's landmark decision in *Boyd*).

52. 277 U.S. 438 (1928).

53. *See Olmstead*, 277 U.S. at 455, 464-71.

54. *Id.* at 464.

55. *Id.*

56. *Id.* at 473 (Brandeis, J., dissenting) ("Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.").

every "unjustifiable intrusion by the government . . . , whatever the means employed."[57]

In delivering the majority opinion in *Olmstead*, Justice Taft was not without concern for the protection of the individual's privacy in the face of government surveillance.[58] He suggested that the lack of Fourth Amendment protection could be remedied by legislative enactment.[59] Congress responded with the enactment of the Federal Communications Act.[60]

In the years after *Olmstead*, the privacy protection afforded by the Fourth Amendment continued to narrow. In the 1940s and 1950s, the Supreme Court maintained its restrictive application of Fourth Amendment protection to telephone wiretapping[61] and declined to apply it to a variety of types of government surveillance activities based solely on the lack of a physical intrusion into the area sought to be held private.[62] This physical presence requirement promulgated by the Court and integrated into its Fourth Amendment jurisprudence was laid to rest in *Katz v. United States*.[63]

Katz is important on a number of fronts. Most importantly, it changed the nature of Fourth Amendment analysis from a trespass model to one based on the protection of people, not places.[64] In *Katz*, the defendant was under investigation for violations of a federal statute that pro-

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57. *Id.* at 478 (Brandeis, J., dissenting). Justice Brandeis was the co-author of one of the first studies of privacy in the modern age. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 220 (1890).

58. *See Olmstead*, 277 U.S. at 465-66.

59. *Id.*

60. In 1934, Congress enacted the Federal Communications Act, formerly Title VI, § 605, 48 Stat. 1103 (codified as amended at 47 U.S.C. § 605 (1969)). Currently, section 605 reads in pertinent part:

> No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . . No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof), or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

47 U.S.C. § 605 (2000).

61. *See* Goldman v. United States, 316 U.S. 129, 132-36 (1942).

62. *See id.*; *see also* Clinton v. Virginia, 377 U.S. 158, 158 (1964) (per curiam) (finding listening device implanted into a party-wall did not violate the Fourth Amendment); Silverman v. United States, 365 U.S. 505, 507-08 (1961) (holding § 605 of the Federal Communications Act inapplicable to conversations heard by virtue of a foot long spike mike); Lee v. United States, 343 U.S. 747, 749, 751 (1952) (holding Fourth Amendment inapplicable to conversation from wire placed on the body of an individual).

63. 389 U.S. 347 (1967).

64. *Katz*, 389 U.S. at 351.

hibited knowingly transmitting wagering information in interstate commerce, a domestic crime.[65] A creature of habit, the defendant tended to use a particular public telephone booth to place calls.[66] The police correctly anticipated that the defendant would use the same telephone on a particular day and at a particular time.[67] The government attached an electronic listening and recording device to the outside of the telephone booth, allowing agents to monitor and record the defendant's half of several conversations.[68] These conversations confirmed that he was taking and placing illegal wagers from the telephone.[69] Over the defendant's objection, the government introduced evidence of the telephone conversations at trial.[70]

The government's argument to admit the conversations was based on the trespass model of Fourth Amendment analysis.[71] Pursuant to this view, the interception of the conversation did not constitute a search since a search could only occur if there had been a physical intrusion into a constitutionally protected area.[72] If the Court followed precedent and accepted the government's argument, then the surveillance would have successfully met the constitutional challenge.[73] Instead, the Court repudiated that view and held that the defendant had a justifiable expectation of privacy while using the telephone booth.[74] Consequently, the interception of the conversation constituted a search and seizure within the meaning of the Fourth Amendment and the evidence should be suppressed.[75]

In reaching its determination, the Court returned to the broad, general scope of Fourth Amendment protection developed in *Boyd*. According to the Court,

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[76]

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65. *Id.* at 354.
66. *Id.*
67. *Id.*
68. *Id.* at 348.
69. *Id.*
70. *Id.*
71. *Id.* at 352-53.
72. *Id.* at 353.
73. *Id.* at 352-53 (citing *Goldman*, 316 U.S. at 134-36 (1942); *Olmstead*, 277 U.S. at 464, 466).
74. *Id.* at 353 ("We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.").
75. *See id.* at 359.
76. *Id.* at 351 (internal citations omitted).

This broader view of privacy did not make the Fourth Amendment into a general constitutional right of privacy.[77] It did, however, reestablish the Fourth Amendment as the individual's guardian against unreasonable government intrusion.

By itself, the majority opinion changed the direction of Fourth Amendment analysis, but it is for Justice Harlan's concurrence that *Katz* is best known.[78] Justice Harlan established the current two-step analysis of Fourth Amendment issues.[79] Under this model, the subject of the search must first have exhibited an actual (subjective) expectation of privacy and, second, the individual's expectation of privacy must be one that society is prepared to recognize as "reasonable."[80] The benchmark of the protection became the sphere of privacy recognized by society as being legitimate under the circumstances.[81] Since *Katz*, the bifurcated inquiry has been used with each new technological advance in surveillance techniques.[82]

A less familiar part of the *Katz* decision foreshadows issues that may arise concerning the government's use of its expanded surveillance powers under the PATRIOT Act—the warrant requirement. After determining that the Fourth Amendment applied to the facts presented in *Katz*, the Court's final issue was whether the search and seizure conducted by the government, without a warrant, complied with constitutional standards.[83] Since the surveillance was conducted without a warrant, it either had to fit one of the exceptions to the warrant requirement or be adjudged unreasonable.[84] The government tried to establish the reasonableness of its surveillance and described the actions of its agents as being very limited in both scope and duration.[85] In fact, on the one occasion

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77. *Id.* at 350.

78. *See id.* at 360-62 (Harlan, J., concurring).

79. *See id.* (Harlan, J., concurring).

80. *Id.* at 361 (Harlan, J., concurring).

81. *See, e.g.*, Veronia School Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995).

82. The Fourth Amendment has been held to cover searches other than those of homes. Among the government actions deemed to constitute a Fourth Amendment search are: searches conducted of cars, *Carroll v. United States*, 267 U.S. 132, 149 (1925), telephones through the use of listening devices, *Katz v. United States*, 389 U.S. 347, 353 (1967), and other electronic means such as pen registers, *Smith v. Maryland*, 442 U.S. 735, 741-42 (1979), electronic monitoring devices, *United States v. Karo*, 468 U.S. 705, 716 (1985), aerial surveillance, *Dow Chemical Co. v. United States*, 476 U.S. 227, 239 (1986), and thermal imaging devices, *Kyllo v. United States*, 533 U.S. 27, 34-35 (2001). However, the subject of the search was not always successful in asserting Fourth Amendment protection. *See, e.g., Carroll*, 267 U.S. at 162; *Smith*, 442 U.S. at 745-46; *Karo*, 468 U.S. at 706; and *Dow Chemical Co.*, 476 U.S. at 239.

83. *Katz*, 389 U.S. at 354-59.

84. *See id.* at 357 & n.19 ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

85. *See id.* at 354.

that the agents intercepted the statements of another person, "the agents refrained from listening to them."[86]

Rather than grant the retroactive validity requested by the government, the Court recognized that the facts supported the conclusion that had a warrant been applied for, it could have been granted by a duly authorized magistrate.[87] The Court decided that a judicial order could have accommodated the legitimate needs of law enforcement by authorizing the carefully limited use of surveillance. Such an order would have protected the individual's privacy by allowing "no greater invasion of privacy than was necessary under the circumstances."[88]

While recognizing that the essence of electronic surveillance rested on a lack of notice to the subject under investigation, the Court refused to create an exception to the warrant requirement for the police.[89]

> Omission of such authorization 'bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after the event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.' And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.'[90]

Notwithstanding the limited nature of the search conducted by the officials in *Katz*, the Court decided that by pursuing the wiretap without first securing a warrant, the government had "ignored the procedure of antecedent justification . . . that is central to the Fourth Amendment, a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case."[91]

Subsequently, the Supreme Court has recognized instances in which a warrant is not a necessary condition precedent to a valid domestic

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> [The agents] did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other states in violation of federal law. . . . The agents confined their surveillance to brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.

Id.

86. *Id.* at 354 n.15.

87. *Id.* at 356-57.

88. *Id.* at 355-56 (citing Berger v. New York, 388 U.S. 41, 57 (1967)). In an earlier case, the Court had held that an "order authorizing the use of the electronic device in *Osborn* afforded similar protections to those of conventional warrants authorizing the seizure of tangible evidence." *Id.* at 355-56 (citing *Berger*, 388 U.S. at 57) (internal quotations omitted).

89. *Id.* at 358.

90. *Id.* at 358-59 (quoting Beck v. Ohio, 379 U.S. 89, 95, 97 (1964)).

91. *Id.* at 359; *see also* discussion *infra* Section III. and notes 246-403, concerning warrant requirements and surveillance done for the protection of national security.

search.[92] The circumstances include searches incident to arrest,[93] "stop and frisk" searches,[94] automobile searches,[95] searches at immigration ports of entry to the United States,[96] and searches of closed containers in automobiles that have been lawfully stopped.[97]

Since *Katz*, the Court has been consistent in holding that if the government intrusion is a search, the person invoking the protection of the Fourth Amendment will only be successful if he can claim a legitimate and justifiable expectation of privacy from the government's intrusion.[98] As opposed to this precept lending strength to privacy protection under the Fourth Amendment, subsequent cases would constrict the situations in which a justifiable expectation of privacy is found.[99] In many of these

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92. *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982) (extending the automobile exception to the Fourth Amendment warrant requirement to closed containers found in lawfully stopped and searched vehicles); *see also* Lewis R. Katz, *Criminal Law:* United States v. Ross*: Evolving Standards for Warrantless Searches*, 74 J. CRIM. L. & CRIMINOLOGY 172 (1983) (examining implications to areas relating to the Fourth Amendment after the Supreme Court's decision in *Ross*).

93. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."); Cupp v. Murphy, 412 U.S. 291, 296 (1973) (holding that where police in the course of station-house questioning took samples from the respondent's fingernails there was not an improper search under the Fourth Amendment); Warden v. Hayden, 387 U.S. 294, 298-300 (1967) (explaining exigent circumstances); *see generally Ross*, 456 U.S. 798 (expanding police authority to conduct warrantless searches of automobiles carrying contained containers); Chimel v. California, 395 U.S. 752, 759, 762-63 (1969) (discussing that searches incident to arrest are limited and, when at all possible, police must attempt to obtain judicial approval through warrant procedure).

94. *See* Terry v. Ohio, 392 U.S. 1, 16-31 (1968) (discussing that police officer's conduct of stop and frisk cannot automatically be considered outside the purview of the Fourth Amendment, but rather must be reviewed under a reasonableness standard).

95. Michigan v. Long, 463 U.S. 1032, 1049 (1983); *see also Carroll*, 267 U.S. at 147-49, 151-53 (establishing that contraband goods concealed and illegally transported in an automobile may be searched without a search warrant).

96. *See* United States v. Ramsey, 431 U.S. 606, 616 (1977) (discussing searches upon entering the United States); *see also* United States v. Duncan, 693 F.2d 971, 977-78 (9th Cir. 1982) (discussing searches upon leaving the United States).

97. *See Ross*, 456 U.S. at 798 (finding a warrantless search of closed containers in automobiles valid); *see also* Katz, *supra* note 92, at 172 ("[T]he Supreme Court extended the automobile exception to the Fourth Amendment warrant requirement to closed containers found in lawfully stopped and searched vehicles.").

98. *See* Rakas v. Illinois, 439 U.S. 128, 148 (1978) (holding an automobile has a different expectation of privacy than a dwelling); United States v. Chadwick, 433 U.S. 1, 7 (1977) (ruling the Fourth Amendment protects people from government intrusions into their legitimate expectations of privacy); United States v. Miller, 425 U.S. 435, 442 (1976) (explaining that a court will examine documents to see if contents were within defendant's expectation of privacy); United States v. Dionisio, 410 U.S. 1, 14 (1973) (holding compelled execution of voice and handwriting samples not to be within defendant's expectation of privacy); Couch v. United States, 409 U.S. 322, 335-36 (1973) (ruling no expectation of protected privacy in situation where an accountant is obligated to disclose information); *Terry*, 392 U.S. at 9 ("[W]here an individual may harbor a reasonable expectation of privacy, he is entitled to be free from unreasonable government intrusion.").

99. *See Kyllo*, 533 U.S. at 34 (allowing use of sense-enhancing technology in use generally by the public); *Karo*, 468 U.S. at 712 (holding an unmonitored beeper to not violate anyone's privacy

cases, the governmental intrusion was aided by enhanced surveillance technology.[100] With each new surveillance technique, the Supreme Court attempted to refine the notion of privacy under the Fourth Amendment.[101] As, a result, the parameters of privacy rights that may be protected are in flux. The fluidity of this situation makes the warrant requirement a lynchpin for the protection of privacy.

1. Thermal Imaging[102]

In most cases addressing the use of a "new technology" by law enforcement officers to conduct a search, courts have to consider the question of whether use of the new technology constitutes a search. Initially, the determination of whether the electronic surveillance can be characterized as being a search depends on whether the technology is intrusive into the target area.[103] If the method is not intrusive, it is not a search requiring the protection of the Fourth Amendment and the failure to obtain a warrant will not defeat the use of the evidence found in the target area.[104]

In *United States v. Penny-Feeney*,[105] for instance, a "non-intrusive" Forward Looking Infrared Device ("FLIR") was used in a fly-over of a suspect's residence.[106] An officer used a FLIR to detect the existence of surface waste heat, which can be the incidental by-product of energy sources used to cultivate marijuana.[107] Based on the results from the FLIR flyover, police obtained a search warrant for the defendants' residence.[108] In the search, they discovered evidence of marijuana production.[109] In denying the defendants' motion to suppress, the district court held that the defendants did not manifest an actual expectation of privacy

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interests); *Smith*, 442 U.S. at 742 (ruling people have no reasonable expectation of privacy when dialing phone numbers); United States v. Penny-Feeney, 773 F. Supp. 220, 226 (D. Haw. 1991) (finding no expectation of privacy in heat voluntarily vented from garage).

100. *See, e.g., Kyllo*, 533 U.S. at 34-35 (using a thermal imaging device to detect heat from heat lamps used to grow marijuana).

101. *See id.* at 34 (allowing use of sense-enhancing technology in use generally by the public); *Karo*, 468 U.S. at 712 (holding an unmonitored beeper to not violate anyone's privacy interests); *Smith*, 442 U.S. at 742 (ruling people have no reasonable expectation of privacy when dialing phone numbers); *Penny-Feeney*, 773 F. Supp. at 226 (finding no expectation of privacy in heat voluntarily vented from garage).

102. "Thermal imaging is a passive, non-intrusive instrument which detects differences in temperature on the surface of objects being observed. It does not send any beams of rays into the area on which it is fixed or in any way penetrate structures within that area." *Penny-Feeney*, 773 F. Supp. at 223.

103. *See Olmstead*, 277 U.S. at 463-64.

104. *See id.* at 464-65.

105. 773 F. Supp. 220.

106. *Id.* at 223-24.

107. *Id.*

108. *Id.* at 224.

109. *Id.*

in the heat waste since they voluntarily vented it outside the garage where it would be exposed to the public and in no way attempted to impede its escape or exercise dominion over it.[110] Likening the heat waste to garbage left on the street, the district court made it clear that even if the defendants had a subjective expectation of privacy, it was not one that society was prepared to recognize as legitimate.[111]

Considering the validity of warrantless thermal imaging surveillance in *Kyllo v. United States*,[112] the Court determined that the use of sense-enhancing technology to gather any information regarding the interior of a home that could not otherwise have been obtained without physical intrusion into constitutionally protected areas constituted a search.[113] The lower courts had held that Kyllo had no subjective expectation of privacy "because he had made no attempt to conceal the heat escaping from his home. . . . [E]ven if he had, there was no objectively reasonable expectation of privacy because the imager did not expose any intimate details of Kyllo's life, only amorphous hotspots on the roof and exterior wall."[114] However, the Supreme Court held that the use of thermal imaging to measure heat emanating from a home was a search, at least where the technology in question was not in general public use.[115] As such, the search was presumptively unreasonable without a warrant.

In making its decision, the Court tried to preserve some measure of privacy against governmental intrusion that existed at the inception of the Fourth Amendment in the eighteenth century.[116] When promulgated, the Fourth Amendment protected the interior of the home.[117] Using that basis, the Court secured for the home a minimal and reasonable expectation of privacy.[118]

> To withdraw protection of this minimal expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. [Thus,] obtaining by sense-enhancing technology any

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110. *Id.* at 226.

111. *See id.* (citing California v. Greenwood, 486 U.S. 35, 37 (1987)).

112. 533 U.S. 27. *Kyllo*'s facts are substantially similar to those of *Peeny-Feeney*. In *Kyllo*, the police suspected that the target was growing marijuana in his home and used a thermal imaging device to determine if the heat emanating from it was consistent with that which would be created by the high energy lamps required for marijuana growth. *Id.* at 29. The scan did show significantly higher heat emanations coming from the target's home as compared to those of his neighbors. *Id.* at 30. Based in part on the thermal imaging, a judge issued a search warrant for Kyllo's home where agents found marijuana growing. *Id.* Kyllo was indicted on federal drug charges and moved, unsuccessfully, to suppress the seized evidence. *Id.* at 29-30.

113. *Id.* at 40.

114. *Id.* at 31.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

> information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search--at least where . . . the technology in question is not in general public use.[119]

2. Electronic Beepers[120]

In *United States v. Karo*,[121] the police 'bugged' a can of ether with an electronic beeper and monitored its movement through a series of private houses and privately rented storage facilities without a warrant.[122] Using evidence from both the beeper and actual observation of sites, the police subsequently obtained a search warrant for the target's premises and found cocaine, allowing the suspects to be arrested.[123] The district court granted the defendants' motion to suppress the seized evidence, charging that the initial warrant to install the beeper was invalid.[124] This illegal conduct by the government tainted the resulting seizure.[125]

The Supreme Court decided that the original installation of the beeper did not violate anyone's Fourth Amendment rights, but cautioned against the use of such techniques without a warrant.[126]

> Despite this holding, warrants for the installation and monitoring of a beeper will obviously be desirable since it may be useful, even critical, to monitor the beeper to determine that it is actually located in a place not open to visual surveillance. . . . [S]uch monitoring without a warrant may violate the Fourth Amendment.[127]

The Court then addressed the privacy concerns raised by the monitoring of a beeper in a private residence in a location not open to visual surveillance.[128] The Court determined this to be a violation of the justifiable

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119. *Id.* at 34 (internal citations omitted).

120. "A beeper is a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." *Karo*, 468 U.S. at 707 n.1 (citing United States v. Knotts, 460 U.S. 276, 277 (1983)).

121. 468 U.S. 705. *Karo* is distinguishable from *Knotts* by the fact that although a beeper had been placed in a 5-gallon can of chloroform, the movements of the car and the arrival of the can at the cabin could have been observed by the naked eye. *Id.* at 707. As such, no Fourth Amendment violation was committed by monitoring the beeper during the trip to the cabin. *Id.*

122. *Id.* at 708. Through an informant, police learned that the targets had bought a number of canisters of ether from an informant. *Id.* The ether was to be used to remove cocaine from clothing. *Id.*

123. *Id.* at 710.

124. *Id.*

125. *Id.* The government appealed and the decision was affirmed on slightly different grounds by the court of appeals. *Id.*

126. *Id.* at 713. There was no violation because the informant who consented to the addition of the beeper owned the ether cans. *Id.* at 711.

127. *Id.* at 713 n.3.

128. *Id.* at 714.

interest in privacy held by the members of the residence.[129] "Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight."[130] Despite this, the monitoring of the beeper revealed nothing about the contents of the rented locker where the ether was stored and, as such, the use of the beeper was not a search of the locker.[131] The specific locker containing the ether was detected by its distinctive smell,[132] and the police subsequently observed the can of ether being moved from that locker to the home.[133] All of these activities were in plain view and constituted no Fourth Amendment violations.[134] As such, the Court reversed the suppression of the evidence.[135]

3. Aerial Surveillance

The Court has not been willing to extend the individual's legitimate sphere of privacy beyond the confines of the home to include the home's backyard.[136] In *California v. Ciraolo*,[137] the Court determined that a naked eye police inspection of an individual's backyard from a fixed wing aircraft at one thousand feet was not a search.[138] Even though the area was within the curtilage of the home, that fact alone did not bar police observation.[139] Likewise, in *Dow Chemical Company v. United States*,[140] the Supreme Court held that the use of aerial photography to conduct a site inspection under the Clean Air Act was not a search for Fourth Amendment purposes.[141]

As a result of these cases, the individual's sphere of protection from unreasonable governmental intrusion has been progressively whittled

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129. *Id.*
130. *Id.* at 716.
131. *Id.* at 720.
132. *Id.* at 720-21.
133. *Id.* at 721.
134. *Id.*
135. *Id.*
136. *See* California v. Ciraolo, 476 U.S. 207, 215 (1986).
137. 476 U.S. 207.
138. *Ciraolo*, 476 U.S. at 215 (citing *Dow Chemical Co.*, 476 U.S. at 239); *see also* Florida v. Riley, 488 U.S. 445, 451-52 (1989) (holding that aerial surveillance from a helicopter in public navigable airspace was non-intrusive and did not constitute a search under the Fourth Amendment).
139. *See Ciraolo*, 476 U.S. at 213; *see also* Oliver v. United States, 466 U.S. 170, 181-83 (1984).
140. 476 U.S. 227.
141. *Dow Chemical Co.*, 476 U.S. at 239. The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant. *Id.* For purposes of aerial surveillance, the open area of an industrial complex is more comparable to an "open field" in which an individual may not legitimately demand privacy. *Id.*

away.[142] It has been diminished even under circumstances in which the subject of the surveillance took steps to secure the area from prying eyes and in situations in which the government used increasingly circumspect methods of surveillance.[143] The juggling of the sphere's parameters has resulted in uncertain standards for the individual's privacy under the Fourth Amendment.[144]

While it may not be clear what the parameters are, the Supreme Court has attempted to fashion protections based upon its sense of the framers' intent. However, the PATRIOT Act has redrawn the lines of the individual's privacy by expanding the type of information susceptible to government acquisition.[145] This expansion reduces the realm in which the individual can have an expectation of privacy under the Fourth Amendment, which impacts other civil liberties.

II. RESTRICTION OF THE LEGITIMATE SPHERE OF PRIVACY BY THE PATRIOT ACT'S AMENDMENT OF PRIVACY PROTECTION LAWS

A. Disclosure of Sensitive Information Under the PATRIOT Act

Current laws shape the parameters of the individual's sphere of privacy by declaring that certain information is not to be disclosed to third parties, including the government, except under specified extraordinary circumstances.[146] The PATRIOT Act makes the disclosure of highly sensitive information routine between a large number of law enforcement agencies and other government personnel.[147] The broad dissemination of information collected for different reasons, some under standards requiring much less than probable cause, could negatively impact the individual's ability to exercise guaranteed civil liberties.

Provisions of the PATRIOT Act eliminate prevailing privacy protection laws, further diminishing the individual's sphere of privacy.[148] Section 505 of the Act amends the Fair Credit Reporting Act,[149] the Financial Right to Privacy Act,[150] and the Electronic Communications Privacy Act,[151] to allow government access to personal information upon

142. *See* LaFave, *supra* note 51, at 121.

143. *See id.* at 112-14.

144. *Id.* at 121. Furthermore, none of the aerial surveillance cases dealt with the propriety of spy satellite surveillance that would be possible for regular law enforcement through the expansion of CIA authority under FISA. *Id.* at 113.

145. USA PATRIOT Act, Pub. L. No. 107-56, § 505, 115 Stat. 272, 365-66 (2001).

146. *See supra* note 14 for a list of federal statutes limiting the disclosure of personal information.

147. USA PATRIOT Act, Pub. L. No. 107-56, § 504, 115 Stat. 272, 364.

148. *See, e.g., id.* § 217, 115 Stat. 272, 291 ("Interception of Computer Trespasser Communications").

149. 15 U.S.C. § 1681u (2000).

150. 12 U.S.C. § 3414(a)(5)(A) (2000).

151. 18 U.S.C. § 2709(b) (2000).

"certification" by an FBI agent that the records are relevant to "an investigation to protect against international terrorism or clandestine intelligence activities."[152] Before the amendment, each of those sections specifically provided government access to the records but, in addition to relevance, also required the government to show that the target of the investigation was "an agent of a foreign power."[153] Section 505 removes the "agent of a foreign power" requirement, and as such, greatly expands government access to a multitude of private records without significant judicial review.[154] In combination with the government's newly enlarged domestic surveillance powers under FISA, Section 505 gives the government unprecedented ability to compile dossiers on private citizens.[155]

In addition to the amendment of these three privacy statutes, the PATRIOT Act also amends the Family Education Rights and Privacy Act ("FERPA")[156] to allow nonconsensual disclosure of student records.[157] FERPA previously limited the disclosure of student records to third parties without the consent of the student or parents.[158] Section 507 amends FERPA to permit access to these educational records in the investigation of domestic or international terrorism, or national security.[159] To secure these records, the government only has to certify that the records are relevant to such an investigation.[160] The application is heard *ex parte*, which precludes the target from contesting disclosure of the information.[161] There is no meaningful review by a court, since the court must issue the order as long as the application contains the certification.[162] Section 507 does say that an investigation of a "United States person" may not be pursued "solely on the basis of activities protected by the First Amendment," but such a statement is not required to be in the certification to the court.[163] Without meaningful judicial oversight, this provision could be used to chill First Amendment speech.

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152. USA PATRIOT Act, Pub. L. No. 107-56, § 505, 115 Stat. 272, 365.

153. *Id.* §§ 505(a)(2), 505(b), 505(c), 115 Stat. 272, 365 (citing 15 U.S.C. § 1681u, 12 U.S.C. § 3414(a)(5)(A), 18 U.S.C. § 2709(b)).

154. *Id.*

155. *See id.*

156. 20 U.S.C. § 1232g (2000).

157. USA PATRIOT Act, Pub. L. No. 107-56, § 507, 115 Stat. 272, 368 (citing 20 U.S.C. § 1232g).

158. 20 U.S.C § 1232g(a)(1). The records protected include information concerning both students' and parents' finances, confidential letters of recommendation, and students' educational records, including records of students in primary, secondary, and post-secondary educational programs. *Id.*

159. USA PATRIOT Act, Pub. L. No. 107-56, § 507, 115 Stat. 272, 367.

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.* § 505, 115 Stat. 272, 365.

In several sections, the PATRIOT Act expands the scope of information subject to disclosure to the government.[164] In many instances, these invasions of the individual's privacy are not subject to judicial review.[165]

B. *Expanded Scope of Subpoenas for Records of Electronic Communications*

Section 2703 of Title 18 of the United States Code governs law enforcement's access to records concerning electronic communications services.[166] Under a prior subsection of this provision, a service provider was required to disclose to a government entity "the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity and length of service of a subscriber and the types of services the subscriber or customer utilized."[167] Section 210 of the PATRIOT Act removes access to the "the types of services the subscriber utilized," but expands the type of information that a provider must disclose to include "records of sessions times and durations," "any temporarily assigned network address," and any means or source of payment, "including any credit card or bank account number."[168] As opposed to narrowing the scope of information subject to disclosure, the new categories potentially expose more personal information about the target than was previously available.[169] This could have a negative impact on the privacy of all subscribers since it applies to all government investigations, not just investigations of suspected terrorist activity.[170] The potentially negative impact on privacy is compounded by the fact that this broader range of information is available to the government merely through the use of a subpoena.[171]

The PATRIOT Act's reduction of the individual's sphere of privacy makes the requirement of a warrant based on probable cause even more important to the protection of the individual's privacy. Any enactment that increases the scope of information subject to government access, but which reduces judicial oversight of the government's efforts at collection, depresses privacy protection under the Fourth Amendment even further. Several provisions of the PATRIOT Act have that effect by allowing electronic surveillance to be performed by law enforcement

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164. *See id.* §§ 505, 507, 115 Stat. 272, 365, 367.

165. *See id.*

166. *See* 18 U.S.C. § 2703 (approved Oct. 21, 2002).

167. USA PATRIOT Act, Pub. L. No. 107-56, § 210, 115 Stat. 272, 283 (citing 18 U.S.C. § 2703(c)(2)).

168. *Id.*

169. *See id.*

170. *See id.*

171. *See* 18 U.S.C. § 2703(b)(B)(i); *see also* USA PATRIOT Act, Pub. L. No. 107-56, § 210, 115 Stat. 272, 283.

agencies not subject to the warrant and probable cause requirements under FISA.[172]

C. *Probable Cause as Protection of Privacy*

> *The standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion. By its very nature electronic eavesdropping for a 60-day period, even of a specified office, involves a broad invasion of a constitutionally protected area. Only the most precise and rigorous standard of probable cause should justify an intrusion of this sort.*[173]

Probable cause is the foundation upon which a search warrant may issue.[174] It does not prevent the government from searching private areas; rather, it establishes the constitutional standard that must be met for governmental intrusion to be valid.[175] Probable cause is based upon evidence that establishes more than "a mere suspicion" that a crime is about to be committed by the target of the investigation.[176] It exists where "the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has or is being committed."[177]

It is not an inflexible rule; it is a "non-technical conception of affording compromise accommodating opposing interests of citizens who are to be safeguarded from unreasonable interferences with privacy and of officers who are charged with enforcing the law."[178] The probable cause required for warrantless searches has fluctuated based upon the perceived intrusiveness of the search, although a uniform standard is viewed as a preferable guide to the police.[179] Due to the highly intrusive

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172. *See* USA PATRIOT Act, Pub. L. No. 107-56, § 210, 115 Stat. 272, 283; *see also* discussion on FISA *supra* note 32.

173. Berger v. New York, 388 U.S. 41, 69 (1967) (Stewart, J., concurring).

174. *Berger*, 388 U.S. at 49.

175. *Id.* at 64 (citing Warden v. Hayden, 387 U.S. 294, 321 (1967) (Douglas, J., concurring)).

176. Brinegar v. United States, 338 U.S. 160, 175 (1949).

177. *Brinegar*, 338 U.S. at 175-76 (citing Carroll v. United States, 267 U.S. 132, 162 (1925)).

178. *See id.* at 176. In this case, the search was of an automobile moving on a public highway and was made without a warrant by federal officers enforcing the liquor laws. *Id.* at 165. The warrantless search and seizure was the result of months of investigative work in which the targets had offered to sell illicit liquor to undercover police officers. *Id.* at 164. The car and license plate used by the targets had been linked to the targets and they had been observed driving on the most used route for the introduction of illicit liquor in the United States. *Id.* All of these facts constituted the probable cause necessary to stop and search the car without a warrant. *Id.*

179. *See, e.g.*, Camara v. Mun. Court, 387 U.S. 523, 538 (1968) (allowing probable cause to be based upon "reasonable legislative or administrative standards of conducting an area inspection which are satisfied with respect to a particular building"). However, the Court declined to adopt a more extended use of this balancing process. *See* Dunaway v. New York, 442 U.S. 200, 213-14 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time

nature of electronic surveillance, the probable cause standard should be maintained.[180]

Justice Douglas's concurrence in *Berger v. New York* foreshadowed the adoption of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and the extensive probable cause requirements required for electronic surveillance.[181]

> I also join the opinion because it condemns electronic surveillance, for its similarity to the general warrants out of which our Revolution sprang and allows a discreet surveillance only on a showing of 'probable cause.' These safeguards are minimal if we are to live under a regime of wiretapping and other electronic surveillance.
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> . . . [E]ven though it is limited in time, it is the greatest of all invasions of privacy. It places the government agent in the bedroom, in the business conference, in the social hour, in the lawyer's office--everywhere and anywhere a 'bug' can be placed.[182]

D. The Warrant Requirement as a Protection of Privacy

The warrant requirement is based in the Fourth Amendment as a condition precedent to a lawful search by the government.[183] A variety of statutes established procedural guidelines to law enforcement officials executing warrants to search areas within the individual's putative sphere of privacy.[184] One of the statutory requirements was that prior to the entry of the target's premises, the officer must have given notice to the target of the search, of the officer's authority, and of the purpose to enter the premises.[185] The notice requirement served several purposes, not the least of which was to protect privacy by minimizing the chance of entry of the wrong premises. Even when there was no mistake, notice allowed those within a brief time to prepare for the police entry.[186]

The rule was not inflexible.[187] While it did require federal officers to serve the subject of the search with a copy of the warrant and a receipt

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and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.").

180. *See Berger*, 388 U.S. at 62-63.

181. *See id.* at 64-68 (Douglas, J., concurring).

182. *Id.* at 64-65 (Douglas, J., concurring).

183. U.S. CONST. amend. IV.

184. *See, e.g.*, FED. R. CRIM. P. 41 (codified at 18 U.S.C. § 3101 (approved Oct. 11, 2002)).

185. *Id.*

186. LAFAVE, *supra* note 39, at 172. Other purposes include: (i) decreasing the potential for violence, as an unannounced entry could lead an individual to believe his safety was in peril and cause him to take defensive measures; and (ii) preventing the physical destruction of property by giving the occupant an opportunity to admit the officer. *Id.*

187. *See* United States v. Villegas, 899 F.2d 1324, 1336 (2d Cir. 1990) (stating that Rule 41(d) does not impose "an inflexible requirement of prior notice" (citing Katz v. United States, 389 U.S. 347, 355 n.16 (1967)).

that described the material obtained, it did not require that the notice be given before the search took place.[188] This approach recognized that there were circumstances under which prior or even contemporaneous notification to the target of the execution of the search might compromise an ongoing investigation.[189] In those cases, a delayed notice exception was recognized for reasonable cause shown if the officers searched the premises but did not seize any property.[190] The officers then had to demonstrate a good reason for the delay and had to provide the notice within a reasonable period after the search, generally no more than seven days.[191] In addition, if the search took place when the owner of the premises was not present, the owner would receive notice that the premises had been lawfully searched pursuant to a warrant, rather than burglarized.[192] "The mere thought of strangers walking through and visually examining the center of our privacy interest, our home, arouses our passion for freedom as does nothing else. That passion, the true source of the Fourth Amendment, demands that surreptitious entries be closely circumscribed."[193]

E. The Warrant Requirement and "Sneak and Peek"[194] Authority Under the PATRIOT Act

Section 213 of the PATRIOT Act amends the warrant provisions of 18 U.S.C. § 3103a in several respects.[195] It allows delayed notice for reasonable cause in concert with existing precedent, but allows for the seizure of property for "reasonable necessity," a vague standard under existing law.[196] The most serious problem with section 213, however, is a

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188. *See* Nordelli v. United States, 24 F.2d 665, 666-67 (9th Cir. 1928).

189. *See Villegas*, 899 F.2d at 1336 (holding that the "Fourth Amendment does not prohibit per se a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment" (citing Dalia v. United States, 441 U.S. 238, 248 (1979))); *see also Katz*, 389 U.S. at 355 n.16 ("[O]fficers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence.").

190. *See Villegas*, 899 F.2d at 1337 (citing *Dalia*, 441 U.S. at 248; *Katz*, 389 U.S. at 355 n.16). Searches without seizures are "less intrusive than a conventional search with physical seizure because the latter deprives the owner not only of privacy but also of the use of his property." *Id.* "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." FED. R. CRIM. P. 41(c)(1).

191. *Villegas*, 899 F.2d at 1337 (citing United States v. Freitas, 800 F.2d 1451, 1456 (9th Cir. 1986)).

192. FED. R. CRIM. P. 41(d) (codified at 18 U.S.C. § 3101 (approved Oct. 11, 2002)).

193. *Freitas*, 800 F.2d at 1456.

194. Kevin Corr, *Sneaky But Lawful: The Use of Sneak and Peek Search Warrants*, 43 U. KAN. L. REV. 1103 (1995).

195. USA PATRIOT Act, Pub. L. No. 107-56, § 213, 115 Stat. 272, 286.

196. *See Field Guidance on New Authorities (Redacted) Enacted in 2001, Anti Terrorism Legislation*, at § 213, *available at* http://www.epic.org/privacy/terrorism/DOJ_guidance.pdf (last visited Oct. 28, 2002) (citing *Villegas*, 899 F.2d at 1337; United States v. Ludwig, 902 F. Supp. 121,

reflection of the uncertain meaning of "reasonable period after the search."[197] Recognizing that the requirement of notice within a reasonable period must be based upon the circumstances of each case, the jurisdictions range from seven to forty-five days as being reasonable and therefore constitutional.[198] Some authority suggests that a reasonable period could be even longer.[199]

The PATRIOT Act could have used this opportunity to clarify an existing problem in the law. However, section 213 essentially allows the government to delay the notice indefinitely, since the reasonable post-search notification period may be extended by the court for "good cause shown."[200] This broadening of the exception is not limited to investigations of suspected terrorist activity.[201] The expansion includes searches of areas that contain material constituting evidence of any criminal offenses in violation of the laws of the United States.[202] This provision is not subject to the sunset provision of section 224 and is therefore a permanent feature of the federal criminal code.[203]

F. Pen Registers[204]

A warrant supported by probable cause is generally required when the government intends to intercept the content of the target's messages.[205] When they first became available with ordinary line telephone

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126 (W.D. Tex. 1995); United States v. Ibarra, 725 F. Supp. 1195, 1200 (D. Wyo. 1989)) [hereinafter *Anti Terrorism Legislation Field Guidance*].

197. *See id.*

198. *Villegas*, 899 F.2d at 1337 (stating that the initial delay should be seven days and only extended with good cause, and relying on the argument that the Constitution itself required prompt notice and that "[s]uch time should not exceed seven days except upon a strong showing of necessity" (citing *Freitas*, 800 F. 2d at 1456)). *But see* United States v. Pangburn, 983 F.2d 449, 454-55 (2d Cir. 1993) (holding that the notice requirement found in Rule 41(d) is not required by the Fourth Amendment and stating that the court, in *Villegas*, did not determine that a warrant was unconstitutional for failure to provide proper notice); United States v. Simons, 206 F. 3d 392, 403 (4th Cir. 2000) (holding that a 45 day delay in notice of execution of warrant does not render search unconstitutional); *see also Anti Terrorism Legislation Field Guidance*, *supra* note 196, § 213.

199. *See Anti Terrorism Legislation Field Guidance*, *supra* note 196, § 209 (citing *Simons*, 206 F.3d at 403).

200. *See id.* (discussing the amendments to 18 U.S.C. §§ 3103(a), 2705, 2510 (2000)).

201. *See id.*

202. *See id.*

203. *See id.*

204. United States v. N.Y. Tel. Co., 434 U.S. 159, 161 n.1 (1977) (stating that Pre-PATRIOT Act, a pen register was defined as "a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It did not overhear oral communications and did not indicate whether calls are actually completed."). This was not the content of the conversations themselves. *N.Y. Tel. Co.*, 434 U.S. at 167.

205. *See Berger*, 388 U.S. at 68 (Stewart, J., concurring). The interception of content in messages for extended periods of time is "a broad invasion of a constitutionally protected area. Only the most precise and rigorous standard of probable cause should justify an intrusion of this sort." *Id.* (Stewart, J., concurring). This view is reflected in the elaborate system of probable cause required for wiretaps under Title III. *See id.* at 64-66 (Douglas, J., concurring).

systems, pen registers did not capture content; they only caught the telephone numbers dialed by the target from a particular telephone.[206] For this reason, a court would grant the order to install and use a pen register on the government's certification "that the information [was] likely to be obtained by such installation and use [was] relevant to an ongoing criminal investigation."[207] The statute required the court to issue the order upon seeing the certification and did not permit judicial review of the government's judgment.[208] A judge in the telephone service provider's jurisdiction could issue the order.[209]

In *Smith v. Maryland*,[210] the Supreme Court determined that the individual did not have a legitimate privacy interest in the telephone numbers he dialed.[211] There, the police chose a suspected burglar as a target for surveillance.[212] After the burglary, the target made a series of harassing calls to the victim and drove by her home.[213] Pursuant to her description of the car and man, police spotted the target and recorded his license plate number.[214] After identifying Michael Lee Smith as the registered owner of the car, the police requested that the telephone company "install[] a pen register at its central offices to record the numbers dialed from the telephone in [Smith's] home."[215] The pen register confirmed that Smith had called the victim's telephone number from his home.[216] Admitting the pen register tape into evidence, the trial court convicted Smith, "holding that the warrantless installation of the pen register did not violate the Fourth Amendment."[217]

Despite the fact that Smith used his home telephone, the Supreme Court found that he had "no actual expectation of privacy in the phone numbers he dialed, and that, even if he did, his expectation was not 'le-

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206. *See N.Y. Tel. Co.*, 434 U.S. at 161 n.1.

207. 8 U.S.C. § 3123 (2000) (amended 2001). This statute lacks "almost all of the significant privacy protections found in Title III, the statute governing the interception of the actual 'content' of a communication (e.g., a phone conversation or the text of an e-mail message)." Electronic Privacy Info. Ctr., *Analysis of Provisions of the Proposed Anti-Terrorism Act of 2001 Affecting the Privacy of Communications and Personal Information* (Sept. 24, 2001), *at* www.epic.org/privacy/terrorism/ata_analysis.html [hereinafter EPIC].

208. *See* EPIC, *supra* note 207.

209. *See* Computer Crime and Intellectual Prop. Section, Dep't of Justice, *Field Guidance on New Authorities that Relate to Computer Crime and Electronic Evidence Enacted in the USA Patriot Act of 2001* (Oct. 2001), *at* http://www.usdoj.gov/criminal/cybercrime/PatriotAct.htm [hereinafter *Computer Crime Field Guidance*].

210. 442 U.S. 735 (1979).

211. *Smith*, 442 U.S. at 745.

212. *See id.* at 737.

213. *See id.*

214. *See id.*

215. *Id.*

216. *Id.*

217. *See id.*

gitimate.'"[218] Such an expectation "[was] 'not one that society [was] prepared to recognize as reasonable.'"[219] Consequently, the Court affirmed Smith's conviction.[220]

Traditionally, the Court extended a great deal of protection to activities occurring inside the home.[221] Telephone conversations, regardless of their site of origin, enjoyed a modicum of Fourth Amendment protection.[222] In finding the site of the telephone call immaterial, the Court added limits to the individual's sphere of privacy from electronic telephonic surveillance.[223] Since the pen register did not intercept the content of the conversation, perhaps the Court felt comfortable denying the individual's expectation of privacy, even without the order, based on the relevance standard.

Despite the technological changes in telephony, Congress had not amended the pen register statute since its 1984 enactment. Lower courts compensated for the apparent failing by simply applying the pen register statute to computer communications without legislative guidance.[224] As a result, various parties challenged the application of the statute to "electronic communications based on the statute's telephone-specific language."[225] Under the PATRIOT Act, the recognition of changes in the technology of pen registers and the maintenance of the relevance standard combine to reduce the ability of targets to challenge government overreaching.

G. Pen Registers and Trap and Trace Devices Under the PATRIOT Act

Under section 216 of the PATRIOT Act, the pen register/trap and trace statutes now apply to the collection of "communications on the

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218. *Id.* at 745.

219. *Id.* at 743 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)); *cf.* United States v. Miller, 425 U.S. 435, 442-43 (1976) (finding no legitimate expectation of privacy in bank records because they contain information voluntarily exposed to a third party).

220. *Smith*, 442 U.S. at 746.

221. *See, e.g.*, Payton v. New York, 445 U.S. 573, 601 (1980) (emphasizing "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic").

222. *See Smith*, 442 U.S. at 746 (Stewart, J., dissenting) ("[T]he broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of [the] Fourth Amendment." (quoting United States v. United States Dist. Court, 407 U.S. 297, 313 (1972))).

223. *See id.* at 743. The Court likened the phone numbers dialed by Smith from his home telephone to information voluntarily turned over to a third person. *Id.* at 743-44 (citing *Miller*, 425 U.S. at 442-43; Couch v. United States, 409 U.S. 322, 335-36 (1973); United States v. White, 401 U.S. 745, 752 (1971); Hoffa v. United States, 385 U.S. 293, 302 (1966); Lopez v. United States, 373 U.S. 427, 438 (1963)). Smith assumed the risk that the telephone company could divulge the telephone numbers, and no expectation of privacy could reside with such information. *See Smith*, 442 U.S. at 744.

224. *See Computer Crime Field Guidance*, *supra* note 209.

225. *See id.*

Internet and other computer networks."[226] Accepting that the statute needed an update to reflect current communications practices, the amendments did not take into account how these changes would impact privacy. The Act adds the terms "routing" and "addressing" to the list of items that can be authorized for interception,[227] but does not define them. These terms give rise to privacy concerns because of the peculiarities of Internet operation. Calling a telephone number on an ordinary telephone line reveals little information other than the number itself. When a call goes through a computer, the uniform resource locators ("URLs") carry information about the target beyond a simple address.[228] Pen registers "attached" to computers would inform the observer what Web sites had been visited, "which is like giving law enforcement the power -- based only on its own certification--to require the librarian to report on the books you had perused while visiting the public library."[229] This potentially infringes upon rights guaranteed by the First Amendment.[230] The probable cause standard provides a more appropriate test of the legitimacy of the government's application for disclosure of the information.

Section 216 tries to avoid violations of the individual's privacy by requiring the government to use reasonably available technology "so as not to include the contents of any wire or electronic communications."[231] The statute does allow for the interception of "routing," "addressing," and "signaling." While the government's interpretations of this provision say that this limits the interception to the "To" and "From" information

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226. *See id.* Section 216 amends 18 U.S.C §§ 3121, 3123, 3124, and 3127. *Id.* This means that these devices can now target such facilities as cellular telephone numbers, specific cellular telephones, Internet user accounts or email addresses, Internet protocol addresses, and port numbers. *Id.* The amendment also allows an applicant for a pen/trap order "to submit a description of the communications to be traced using any of these or other identifiers." *Id.*

227. *See id.*

228. David W. Baker, *A Guide to URLs*, *at* http://www.netspace.org/users/dwb/url-guide.html#what (last visited Mar. 12, 2003). Unlike a telephone number,

> [a] URL is like your complete mailing address: it specifies all the information necessary for someone to address an envelope to you. However, they are much more than that, since URLs can refer to a variety of very different types of resources. A more fitting analogy would be a system for specifying your mailing address, your phone number, or the location of the book you just read from the public library, all in the same format.

Id. In June 2000, the FBI advised Senator Leahy, Chairman of the Senate Judiciary Committee, that pen register devices "capture all electronic impulses transmitted by the facility on which they are attached, including such impulses transmitted after a phone call is connected to the called party." *See* 147 CONG. REC. S10990-02 (daily ed. Oct. 25, 2001) (statement of Sen. Leahy). "The impulses made after the call is connected could reflect the electronic banking transactions a caller makes . . . or the electronic ordering of a prescription drug." *Id.*

229. Am. Civil Liberties Union, *USA Patriot Act Boosts Government Powers While Cutting Back on Traditional Checks and Balances, An ACLU Legislative Analysis*, *at* http://archive.aclu.org-/congress/l110101a.html (last visited Mar. 2, 2002).

230. *See* Am. Library Ass'n, *Library Community Statement on Proposed Anti-terrorism Measures*, *at* http://www.ala.org/washoff/terrorism.pdf (last visited Oct. 14, 2002).

231. USA PATRIOT Act, Pub. L. No. 107-56, § 216, 115 Stat. 272, 288.

contained in an e-mail header,[232] the e-mail header also includes the "subject line," which could be considered to be content.

The courts must clarify this contradiction. In essence, section 216 allows for the collection of personal information without the privacy protection provided by the judicial probable cause review under the established wiretap law. It retains this provision's relaxed standard of relevance, expanding the scope of potentially discoverable private information. Section 216 exacerbates this lowered standard of legitimacy by authorizing pen register/trap and trace orders with nationwide effect.[233]

The practical realities of multi-jurisdictional Internet communications make it clear why the government would want this ability in its arsenal. An order for this type of surveillance could previously be granted only "within the jurisdiction of the court."[234] A single communication could pass through several different carriers in a range of jurisdictions.[235] In order to follow the communication to its source, prior law required that the government seek the support of a prosecutor in each successive jurisdiction to obtain an order in that jurisdiction.[236] This slowed down the investigation.[237]

The government's practical solution imposes a burden on any carrier seeking to challenge the installation of the pen register/trap and trace device for legal or procedural defects. Section 216 removes another legal safeguard from the system by requiring carriers to travel to the distant court that issued the order. [238] "The burden would be particularly acute for smaller providers -- precisely those, for instance, who are most likely (according to the FBI) to be served with orders requiring the installation of the Carnivore system."[239]

The expansion of Pen Registers and Trap and Trace devices to the Internet opens the door to the FBI's use of Carnivore without significant court review.[240] Carnivore raises controversial issues because it "pro-

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232. Leonard Bailey, *Computer Crimes and Intellectual Property Section Department of Justice, International Terrorism, the Internet, and the USA Patriot Act, at* www.usdoj.gov/usao-/eousa/foia_reading_room/usab5003.pdf (last visited Mar. 10, 2003).

233. *See id.*

234. *See Computer Crime Field Guidance, supra* note 209.

235. *See id.*

236. *See id.*

237. *See id.*

238. *See* EPIC, *supra* note 207.

239. *Id.*

240. According to the FBI:

> The Carnivore device provides the FBI with a "surgical" ability to intercept and collect the communications which are the subject of the lawful order while ignoring those communications which they are not authorized to intercept. . . . The Carnivore device works much like commercial "sniffers" and other network diagnostic tools used by ISPs every day, except that it provides the FBI with a unique ability to distinguish between communications which may be lawfully intercepted and those which may not. For

vides the FBI with access to the communications of all subscribers of a monitored Internet Service provider [("ISP"),] . . . not just those of the court-designated target."[241] Section 216 provides that if the communications provider cannot carry out the court order, the government may install a device of its own.[242]

Essentially, Section 216 allows the judge, operating under a relevance standard, to issue a blank warrant to a succession of communications carriers.[243] This fails to meet the Fourth Amendment requirement of specifying the place to be searched.[244] It also deprives the judge of the ability to monitor the extent to which government officials utilize the order to access information about Internet communications.[245]

Section 216 expands the scope of information subject to government surveillance, but does not provide any of the privacy protections of prior law. It also allows access to items containing content without any independent judicial review. These provisions, as well as the nationwide service, all reduce the individual's privacy from governmental intrusion. This impacts both Fourth Amendment protections and First Amendment rights. Since Congress did not subject Section 216 to the sunset provisions of Section 224 of the PATRIOT Act, it represents a permanent change to the federal criminal code.

> example, if a court order provides for the lawful interception of one type of communication (e.g., e-mail), but excludes all other communications (e.g., online shopping) the Carnivore tool can be configured to intercept only those e-mails being transmitted either to or from the named subject.

Federal Bureau of Investigation, *Carnivore Diagnostic Tool, at* www.fbi.gov.hq/lab/carnivore/carnivore2.htm (last visited Mar. 1, 2002).

241. EPIC, *supra* note 207. In response to the FBI's introduction of Carnivore in July 2000, some members of Congress expressed their "intent to examine the issues and draft appropriate legislation." *Id.*

242. *See* USA PATRIOT Act, Pub. L. No. 107-56, § 216, 115 Stat. 272, 289. Under these circumstances,

> [s]ection 216 require[s] the law enforcement agency to provide the following information to the court under seal within 30 days: (1) the identity of the officers who installed or accessed the device; (2) the date and time the device was installed, accessed, and uninstalled; (3) the configuration of the device at installation and any modifications to that configuration; and (4) information collected by the device.

See Computer Crime Field Guidance, *supra* note 209. The government may use devices such as Etherpeek or DCS 1000 (a.k.a. Carnivore). *See id.*

243. The section does require that the issuing court have jurisdiction over the particular crime being investigated. *See* USA PATRIOT Act, Pub. L. No. 107-56, § 216, 115 Stat. 272, 290.

244. The Fourth Amendment provides in pertinent part, "[N]o Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

245. The certification of probable cause by a neutral magistrate protects the privacy of the subject of a proposed search from the over-zealousness of the police in their attempt to discover evidence of a crime. *See generally* Aguilar v. Texas, 378 U.S. 108 (1964) (discussing the importance of the magistrate's informed decisions on probable cause); Johnson v. United States, 333 U.S. 10 (1948) (discussing the warrant as a guard against governmental eagerness to search apparently private areas).

III. THE PRIVACY IMPLICATIONS OF THE EXPANSION OF FISA TO DOMESTIC INVESTIGATIONS

Law enforcement officials often pursue intelligence surveillance by the use of wiretapping technologies. Consequently, the PATRIOT Act closely links the federal wiretapping statute and the Foreign Intelligence Surveillance Act ("FISA"). The divergent histories of these two statutes provide the most compelling arguments for retracting the extensive grants of authority given to the executive branch under the PATRIOT Act. Without the reestablishment of traditional checks and balances on the government's ability to conduct domestic clandestine surveillance, the history of the government's flagrant violations of the individual's exercise of First Amendment freedom could become this nation's prologue.

A. *Intelligence Surveillance and Wiretapping*

> *History abundantly documents the tendency of Government – however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.*
>
> *The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.*[246]

Through its interpretation of the Fourth Amendment, the Supreme Court has narrowed the legitimate sphere of the individual's privacy in the attempt to balance the government's need to regulate activity and the citizens' right to live free from government involvement.[247] The inevitable conflict between these two imperatives becomes tenser when the government performs surveillance to protect national security.[248] In its amendments to FISA, the PATRIOT Act abandons a long held taboo and extends domestic surveillance authority to the Central Intelligence

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246. United States v. United States Dist. Court, 407 U.S. 297, 314 (1972).

247. While the Fourth Amendment "protects . . . against certain kinds of governmental intrusion, . . . its protections go further, and often have nothing to do with privacy at all," while other aspects of privacy are protected by different provisions of the Constitution or left to state law. *See* Katz v. United States, 389 U.S 347, 350-51 (1967).

248. *See infra* text accompanying notes 292-301 concerning the prior restraints on foreign intelligence surveillance under FISA. *See generally* William F. Brown & Americo R. Cinquegrana, *Warrantless Physical Searches For Foreign Intelligence Purposes, Executive Order 12,333 and The Fourth Amendment*, 35 CATH. U. L. REV. 97 (1985) (describing the use of warrantless physical searches, and judicial exceptions and parameters for intelligence gathering).

Agency ("CIA").[249] This action eliminates a long recognized distinction between acceptable warrantless electronic surveillance performed in the name of national security and surveillance supported by probable cause necessary for the prosecution of ordinary criminal matters.[250]

Governmental surveillance for the protection of national security emphasizes the interdependency of the First Amendment's freedom of speech and of association and the Fourth Amendment's freedom from unreasonable governmental intrusion.[251] Neither value can "exist without the other."[252] Abuse of the governmental prerogative to institute surveillance without judicial oversight has been demonstrated to negatively impact the other freedoms guaranteed by the Constitution.[253]

B. The Traditional Prohibition of Domestic Authority for Intelligence Collection

The government has used clandestine electronic surveillance devices for many years.[254] *Olmstead v. United States*[255] supported the use of these techniques by excluding governmental wiretapping from the ambit of the Fourth Amendment.[256] Enacted shortly after the *Olmstead* decision, the Federal Communications Act ("FCA") of 1934 protected citizens from the unauthorized disclosure of information obtained through electronic surveillance and from the use of the fruits of government wiretaps.[257] It did not, however, stop the practice of clandestine surveillance.

Despite the enactment of the FCA, the government continued to employ warrantless electronic surveillance in cases involving national security or threats to human life.[258] Congress perceived this ability as so threatening to democracy that it limited the CIA to the investigation of

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249. USA PATRIOT Act, Pub. L. No. 107-56, § 901, 115 Stat. 272, 387 (2001).

250. Aware of the potential for abuse, Congress "was unwilling to make [the CIA] a policeman at home, or to create conflict between the CIA and the FBI." Weissman v. CIA, 565 F. 2d 692, 695 (D.C. Cir. 1977); *see generally* Sherri J. Conrad, *Executive Order 12,333: Unleashing The CIA Violates the Leash Law*, 70 CORNELL L. REV. 968 (1985).

251. *See* RICHARD C. TURKINGTON & ANITA L. ALLEN, PRIVACY LAW: CASES AND MATERIALS 193 (West 1999).

252. *Id.* at 194.

253. *See id.*

254. *See Intelligence Activities: The National Security Agency and Fourth Amendment Rights, Hearing Before the Senate Comm. to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong. 84, 87 (1975) (statement of Att'y Gen. Edward H. Levi) [hereinafter *Intelligence Activities*]; Note, *The Foreign Intelligence Surveillance Act: Legislating a Judicial Role in National Security Surveillance*, 78 MICH. L. REV. 1116, 1116 (1980).

255. 277 U.S. 438 (1928), *overruled in part by* Berger v. New York, 388 U.S. 41 (1967) and *Katz*, 389 U.S. 347.

256. *See Olmstead*, 277 U.S. at 466.

257. *See* Nardone v. United States, 302 U.S. 379, 380-82 (1937).

258. *Intelligence Activities*, *supra* note 254, at 85-87.

non-domestic issues.[259] Congress later construed this to mean that the CIA could also conduct clandestine intelligence gathering and surveillance abroad.[260]

From the beginning, congressional leaders recognized the potential for abuse by an organization with authority to pursue clandestine surveillance.

> [The C]entral [I]ntelligence agency is supposed to collect military intelligence abroad: but we want to be sure it cannot strike down into the lives of our own people here. So we put in a provision that the agency shall have no police, subp[o]ena, law–enforcement powers, or internal–security functions.[261]

Congress, therefore, limited the CIA's activities to foreign intelligence gathering because of the potential for abuse inherent in making the CIA "a policeman at home."[262] Administration officials reemphasized the primacy of the law barring the CIA from domestic intelligence collection activities.[263]

In *Weisman v. CIA*, the District of Columbia Circuit Court of Appeals stated that the National Security Act of 1947 "was intended, at the very least, to prohibit the CIA from conducting secret investigations of United States citizens, in this country, who have no connection with the Agency."[264] The court noted:

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259. The CIA succeeded the Office of Strategic services ("OSS"), which President Roosevelt created to gather and analyze wartime strategic information. COMM'N ON CIA ACTIVITIES WITHIN THE UNITED STATES, REPORT TO THE PRESIDENT 45 (1975) [hereinafter ROCKEFELLER COMMISSION]; *see generally* H. RANSOM, THE INTELLIGENCE ESTABLISHMENT (1970). Disbanded in 1945, the OSS had no domestic surveillance authority. ROCKEFELLER COMMISSION, *supra*, at 46. Two years later, President Truman created the Central Intelligence Group ("CIG") to operate abroad. *See generally* Michael Warner, *Salvage and Liquidate: the Creation of the Central Intelligence Agency*, *at* http://www.cia.gov/csi/studies/96unclass/salvage.htm (last visited Mar. 24, 2003). Finally, the National Security Act of 1947 replaced the CIG with the CIA and again restricted the agency's activities to overseas intelligence activities. National Security Act of 1947, Pub. L. No. 80-253, § 102, 61 Stat. 495, 498 (1947).

260. S. REP. NO. 94-755, bk.1, at 128 (1976).

261. Conrad, *supra* note 250, at 974-75 (alteration in original).

262. *Weissman*, 565 F.2d at 695.

263. *See* Conrad, *supra* note 250, at 975. In 1947, Central Intelligence Group Director Vandenberg told Congress that the "prohibition against police powers or internal security functions will assure that the Central Intelligence Group [predecessor of Central Intelligence Agency] can never become a Gestapo or Security Police." *Id.* (quoting *Hearing on S. 758 Before the Senate Comm. on Armed Services*, 80th Cong. 497 (1947) (statement of Hoyt S. Vandenberg, Director, Central Intelligence Group)). Dr. Vannevar Bush echoed this theme when he testified before Congress that the CIA posed "no danger" of becoming a Gestapo because "the bill provides clearly that it is . . . not concerned with intelligence on internal affairs." *See National Security Act of 1947: Hearings on H.R. 2319 Before the House Comm. on Expenditures in the Exec. Departments*, 80th Cong. 559 (1947) (testimony of Dr. Vannevar Bush, Chairman, Joint Research and Development Board, War and Navy Departments).

264. *Weissman*, 565 F.2d at 695.

> Congress wisely sought from the outset to make sure that when it released the CIA genie from the lamp, the Agency would be prevented from using its enormous resources and broad delegation of power to place United States citizens living at home under surveillance and scrutiny. It denied the Agency police or internal-security functions to obviate the possibility that overzealous representatives of the CIA might pry into the lives and thoughts of citizens whose conduct or words might seem unconventional or subversive.[265]

When an investigation targeted "an agent of a foreign power," however, the intelligence community continued to pursue warrantless surveillance on the assumption that an exemption to the Fourth Amendment warrant requirement authorized such activity.[266]

The Supreme Court reserved judgment on the issue as it related to national security, but the justices did not unanimously support that position. In a footnote to the *Katz* decision, the majority stated that they had not been asked to determine "whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security."[267] The Court inferred that in matters of national security, the executive branch's determination of necessity would alleviate the need for government agents to comply with the warrant clause of the Fourth Amendment.[268]

Granting such deference to the executive branch prompted a concurring opinion from Justice Douglas. Justice Douglas decried it as a "wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels 'national security' matters."[269] Justice Douglas observed that in matters of national security the President and the Attorney General could not be "neutral and disinterested," but rather they must act as interested parties—adversaries protecting the nation's interests.[270] If the executive branch tried to simultaneously wear both hats, Douglas speculated that the individual's freedom, as protected by the Fourth Amendment, would suffer.[271]

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265. *Id.*; *see also* Birnbaum v. United States, 588 F.2d 319, 329-32 (2d Cir. 1978) (discussing the authority of the CIA).

266. *See* Conrad, *supra* note 250, at 979; *see generally* David S. Eggert, Note, *Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches*, 1983 DUKE L.J. 611 (1983) (arguing the national security exception to the Fourth Amendment warrant requirement is unconstitutional).

267. *Katz*, 389 U.S. at 358 n.23.

268. It is peculiar that the Court would make such a statement outside of the issues raised. It could be that the Court made the statement in reference to Congressional discussion of the Omnibus Crime Control and Safe Streets Act of 1968, enacted the following year.

269. *Katz*, 389 U.S. at 359 (Douglas, J., concurring).

270. *See id.* at 359-60 (Douglas, J., concurring).

271. *See id.* at 360 (Douglas, J., concurring).

> Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers . . . , I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured where the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.[272]

Justice Douglas observed that the framers of the Constitution did not distinguish between types of crimes in considering the application of the Fourth Amendment protections from unreasonable search and seizure.[273] As such, the judiciary should maintain its oversight of the executive branch's exercise of surveillance, even under circumstances of national emergency. The rules should "not [be] improvise[d] because a particular crime seems particularly heinous."[274]

Likewise, in *United States v. United States District Court*, the Court declined to address whether the Fourth Amendment applied to foreign intelligence surveillance.[275] It also rejected the government's claim of a national security exemption from the Fourth Amendment for domestic matters because of the impact such license could have on civil liberties.[276]

The PATRIOT Act's creation of the crimes of "domestic terrorism" and "harboring a terrorist"[277] could negatively impact the exercise of unpopular political ideas, just as the Court warned in these prior cases. Section 802 of the PATRIOT Act defines domestic terrorism as activities that:

> (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
>
> (B) appear to be intended—
>
> (i) to intimidate or coerce a civilian population;
>
> (ii) to influence the policy of a government by intimidation or coercion; or
>
> (iii) affect the conduct of a government by mass destruction, assassination or kidnapping; and

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272. *Id.* (Douglas, J., concurring).

273. *See id.* (Douglas, J., concurring). Here, Justice Douglas noted that Article III, section 3 of the U.S. Constitution gave treason a limited definition, but it did not receive special status under the Fourth Amendment. *Id.* (Douglas, J., concurring).

274. *Id.* (Douglas, J., concurring).

275. *United States Dist. Court*, 407 U.S. at 321-22 ("We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.").

276. *See id.* at 320.

277. USA PATRIOT Act, Pub. L. No. 107-56, §§ 802-03, 115 Stat. 272, 376.

(C) occur primarily within the territorial jurisdiction of the United States.[278]

Section 803 of the PATRIOT Act makes the act of harboring or concealing any person known or reasonably believed to have committed one of several named offenses a crime punishable by fine, imprisonment, or both.[279] If section 802 clearly defined the crime of domestic terrorism, section 803 would be less problematic. Section 802, however, could be subject to constitutional challenge as being both vague and overbroad. Under the language of section 803, the government could classify as domestic terrorism any activity it found unpopular, including such legitimate activist actions as labor union strikes and protests concerning abortion rights, animal rights, civil rights, the environment, or the G-4. A comprehensive provision such as section 803 invites government overreaching.

Protests that arouse the emotions of a large crowd could become dangerous to human life. By their terms, protests intend to "intimidate or coerce a civilian population" and/or to "influence the policy of a government."[280] The government may also disfavor protests challenging its policies. Provisions such as sections 802 and 803 could make any such group or participating individual a target of governmental surveillance.

Unfortunately, this concern is not a speculative one. Less than 30 years ago, the government of the United States was found by a Senate committee to have violated the civil liberties of American citizens who challenged governmental policies.[281] In one case, the government repeatedly conducted warrantless electronic surveillance of an organization's lawful contacts with citizens of Soviet Russia.[282] Attorney John Mitchell authorized several surveillance requests to provide the FBI with advance knowledge of any activities that could cause international embarrassment

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278. *Id.* § 802, 115 Stat. 272, 375. "International Terrorism" is defined, in part, as "activities that . . . occur primarily outside the territorial jurisdiction of the United States." 18 U.S.C. § 2331(1) (2000).

279. USA PATRIOT Act, Pub. L. No. 107-56, § 803, 115 Stat. 272, 376-77.

280. *Id.* § 802, 115 Stat. 272, 375.

281. In 1975, the United States Senate established a committee to "conduct an investigation of governmental operations with respect to intelligence activities and the extent, if any, to which illegal, improper, or unethical activities were engaged in by any agency of the Federal Government." S. Res. 21, 94th Cong. § 1 (1975). Under the leadership of Sen. Frank Church, the Committee made the following statement in its report: "The Committee's investigation has, . . . confirmed substantial wrongdoing. And it had demonstrated that intelligence activities have not generally been governed and controlled in accord with the fundamental principles of our constitutional system of government." S. REP. NO. 94-755 (1976). "United States intelligence agencies have investigated a vast number of American citizens and domestic organizations. FBI headquarters alone has developed over 500,000 domestic intelligence files." *Id.* at 6.

282. *See* Zweibon v. Mitchell, 516 F.2d 594, 608-10 (D.C. Cir. 1975). The Jewish Defense League contacted Soviet citizens concerning that country's restrictive emigration policies. *Id.*

to the United States.[283] Several other vast investigations occurred even when the citizens concerned had no ties to foreign powers.[284]

In several instances, the government used collected information to actively disrupt protest organizations.[285] To discredit the leaders of activist organizations, the government selectively leaked negative information about the individuals to third parties.[286] Through its COINTELPRO program, the FBI selectively shared "information from its investigations to deny people employment and to smear their reputations."[287] The Church Committee Report documented the FBI's attempt to discredit Dr. Martin Luther King.[288] The FBI justified its continued political surveillance of Dr. King by saying "that some of [his] advisors were Communists," i.e., a threat to national security.[289] It then disclosed derogatory information about Dr. King to the "media and other private organizations" in an effort to block his selection as a recipient of the Nobel Peace Prize.[290] The FBI also resorted to the intimidation and harassment of Dr. King. In one instance, the FBI sent a prepared composite tape recording to Dr. King apparently inviting him to commit suicide.[291] The government took these actions under a system that provided little or no oversight of its intelligence collection activities.

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283. *Id.* at 610.

284. Due to allegations of improper surveillance, President Ford formed the Commission on CIA Activities Within the United States under the leadership of then Vice President Rockefeller. *See* Exec. Order No. 11,828, 40 Fed. Reg. 1219 (1975). The Commission's investigation confirmed that the Agency collected information on several individuals, many of whom were civil rights and anti-war activists. ROCKEFELLER COMMISSION, *supra* note 259. The Agency had intercepted, opened, and photographed first class letters, and indexed and computerized the names of alleged domestic political dissidents. *Id.* The Church Committee Report described how Project MERRIMAC "expanded into a general collection effort whose results were made available to other components in the CIA, and . . . the FBI." *See* S. REP. NO. 94-755, at 725 (1976).

285. 147 CONG. REC. S10990-02 (daily ed. Oct. 25, 2001).

286. *See id.*

287. *Id.*

> Beginning with Communist and socialist groups, the FBI's COINTELPRO operations spread in the 1960s to the Klan, the "new left," and black militants. Elements of the civil rights and antiwar movements were targeted for disruption because of suspicion that they were "influenced" by communists; others because of their strident rhetoric. When some targets were suspected of engaging in violence, the FBI's tactics went so far as to place lives in jeopardy by passing false allegations that individuals were government informants.

Id.

288. *See* S. REP. NO. 94-755, at 11 (1976).

289. 147 CONG. REC. S10990-02, S10993 (daily ed. Oct. 25, 2001).

290. *Id.*

291. *Id.*

C. *Intelligence Surveillance Under FISA*[292]

Concerns over the domestic abuse of surveillance gave rise to FISA, which instituted a set of procedures for the electronic collection of foreign intelligence and counterintelligence.[293] Significantly, FISA allowed the government a higher degree of governmental intrusion with a significantly lowered standard of review in certain instances when seeking foreign intelligence information.[294] When applying for an order, FISA required the government to identify the target of the surveillance, list the information relied on by the government to demonstrate that the target represented "a foreign power or an agent of a foreign power," and certify that the order sought to obtain "foreign intelligence information."[295] FISA's provisions established a scheme of surveillance oversight that purportedly protected the individual's privacy.[296]

Since the government could authorize foreign intelligence surveillance under less than a probable cause standard, the government could use it at trial only with the Attorney General's advance authorization and after giving notice to the "aggrieved person."[297] This notice gave rise to the aggrieved person's opportunity to suppress the information based on the illegality of the surveillance.[298] However, reviewing courts consid-

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292. Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978).

293. *See* S. REP. NO. 95-701, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 3974.

294. *See* Foreign Intelligence Surveillance Act ("FISA") of 1978, Pub. L. No. 95-511, § 102, 92 Stat. 1783, 1786. Otherwise, FISA maintains the requirement of a court order authorizing foreign intelligence electronic surveillance. The order requirements under FISA are similar to those for obtaining an order under Title III. After obtaining the Attorney General's approval, the federal officer must make application for the order to one of seven U.S. Foreign Intelligence Surveillance Court ("USFISC") judges. *See id.* §§ 103-104, 92 Stat. 1783, 1788-90.

295. *See id.* § 102(b), 92 Stat. 1783, 1787. FISA also required that the application list the evidence showing that the foreign power or its agent used or planned to use the site of the surveillance; state the type of surveillance the government planned to use; and list the government's proposed minimization procedures. *See id.* Under FISA, the USFISC judge must make a specific finding that each element of the application is supported by probable cause and that the proposed minimization procedures are proper. *Id.* § 105, 92 Stat. 1783, 1790-93. One of FISA's most important judicial oversight provisions states that the government cannot classify a 'United States person' as "a foreign power or an agent of a foreign power solely upon the basis of activities protected by the [F]irst [A]mendment." *Id.* § 105(a)(3)(A), 92 Stat. 1783, 1790.

296. *See* Helene E. Schwartz, *Oversight of Minimization Compliance under the Foreign Intelligence Surveillance Act: How the Watchdogs are Doing Their Job*, 12 RUTGERS L.J. 405, 414-33 (1981). The executive branch of government, through its Attorney General, established minimization procedures as well as internal review procedures and supervision of warrantless surveillance. *Id.* The judiciary could impact the surveillance at three stages: passing on applications, assessing the legality of the surveillance, and imposing civil or criminal liability for violations. *Id.* at 433-72. Finally, reports concerning surveillance pursued under this section had to be submitted to Congress. *Id.* at 472-83.

297. Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, § 106(c), 92 Stat. 1783, 1793.

298. *Id.* § 106(e), 92 Stat. 1783, 1794.

ered an Attorney General's wiretap order presumptively valid, making it difficult for an individual to challenge the legality of the surveillance.[299] In addition, a motion to suppress did not guarantee disclosure of the information to the aggrieved person.[300] The court could disclose the information "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance."[301]

D. The Collision of Title III Evidence Collection and Foreign Intelligence Surveillance

Several provisions of the PATRIOT Act ignore the distinction between the collection of information for domestic criminal investigations and foreign intelligence collection. This destroys the traditional balance between the government and the individual under the Fourth Amendment. Before the PATRIOT Act, in cases assessing motions to suppress or requesting disclosure of FISA-collected information, the courts emphasized the distinction between cases of surveillance under FISA and those under Title III.[302]

In *United States v. Belfield*,[303] the government charged the defendants with "conspiracy to murder, accessory after the fact, grand larceny, unauthorized use of a vehicle, and perjury in connection with [an] assassination."[304] The defendants "requested disclosure of any electronic surveillance" concerning them.[305] The government admitted overhearing each of the defendants during electronic surveillance authorized under FISA.[306]

Pursuant to the statute, the district court judge made an *ex parte* determination of the legality of the surveillance after examining the relevant evidence *in camera*.[307] The defendants challenged the procedures on both statutory and procedural grounds.[308] The defendants asserted that the mandatory disclosure provisions of Title III "must be read into FISA

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299. *See* Conrad, *supra* note 250, at 979 (approving electronic surveillance of illegal bookmaking suspects (citing United States v. Feldman, 535 F.2d 1175, 1180-81 (9th Cir. 1976)); United States v. Turner, 528 F.2d 143, 150-51 (9th Cir. 1975) (approving interception of wire communications of alleged narcotics conspirators).

300. *See* Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, § 106(f), 92 Stat. 1783, 1794. By filing an affidavit under oath that the disclosure of the information would harm the national security of the United States, the Attorney General may request an *ex parte* determination of the legality of the surveillance based upon an in camera examination of the relevant materials. *Id.*

301. *Id.*

302. *See* United States v. Belfield, 692 F.2d 141, 148 (D.C. Cir. 1982).

303. 692 F.2d 141, 143.

304. *See id.* at 143.

305. *Id.*

306. *Id.*

307. *See id.* at 144.

308. *See id.*

to save it from constitutional infirmity."[309] The District of Columbia Circuit Court of Appeals rejected this argument, stating:

> Appellants . . . completely ignore the nature of the national interests implicated in matters involving a foreign power or its agents. [Title III] covers domestic, criminal surveillance. FISA is concerned with foreign intelligence surveillance. In the former, Congress emphasized the privacy rights of U.S. citizens. In the latter, Congress recognized the need for the Executive to engage in and employ the fruits of clandestine surveillance without being constantly hamstrung by disclosure requirements.[310]

The statutory scheme under FISA "center[ed] on an expanded conception of minimization that differs from that which governs law-enforcement surveillance."[311] Pursuant to FISA, the court merely determines whether the application and order comply with the statutory requirements: "No further judicial procedures are necessary to adequately safeguard appellants' rights."[312] This differs from the standard of checks and balances that characterizes domestic criminal law.

Perhaps because of this, the courts have tended to condemn domestic warrantless electronic surveillance, even if the target posed a "domestic threat[] to the national security."[313] By contrast, when the circumstances involved surveillance of foreign nationals, the lower courts generally upheld the surveillance.[314] When the surveillance had both domestic criminal investigative and foreign intelligence purposes, however, the lower courts upheld the warrantless electronic surveillance of American citizens despite its impact on the rights of the accused.[315]

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309. *See id.* at 148. The defendants relied on section 2518 of Title III, which provides that "the contents of an intercepted communication may not be used in any proceeding unless the aggrieved person is first furnished with a copy of the application and the court order authorizing the interception." *See id.* at 184 n.31.

310. *Id.* at 148.

311. *See id.* (citing Helene E. Schwartz, *Oversight of Minimization Compliance Under the Foreign Intelligence Surveillance Act: How the Watchdogs are Doing Their Job*, 12 RUTGERS L.J. 405, 408 (1981)).

312. *See id.* at 149.

313. *See, e.g., United States Dist. Court*, 407 U.S. at 320, 322, 323-24.

314. *See, e.g.*, United States v. Truong Dinh Hung, 629 F.2d 908, 914-15 (4th Cir. 1980); United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974).

315. *See, e.g.*, United States v. Clay, 430 F.2d 165, 170-71 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971). The government sought to use the results of wiretaps in its case against Muhammad Ali, then known as Cassius Clay, for violating the Selective Service Act. *Clay*, 430 F.2d at 166. While ordering disclosure of four of the five conversations, the court of appeals upheld the district court's conclusion that the fifth wiretapped conversation resulted from "lawful surveillance by the FBI pursuant to the Attorney General's authorization of a wiretap for the purpose of gathering foreign intelligence," and therefore would not be disclosed to Clay. *See id.* at 166, 171; *see also* United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973) (affirming the President's power

The information-sharing agreements enjoyed by the various intelligence groups and the FBI partly made possible the abuses of the 1970s. The Church Committee Report documented a CIA-FBI agreement that improved the intelligence coordination between the two agencies. "[T]he policies embodied in that agreement clearly involved the CIA in the performance of internal security functions."[316] In essence, requiring the FBI and the CIA to cooperate in intelligence collection circumvented the National Security Act's prohibition against the CIA's participation in domestic intelligence gathering.[317] The CIA's partnership with the FBI did not make this practice legitimate.[318]

E. Broadened Scope of FISA Surveillance on the Domestic Front Under the PATRIOT Act

Congress enacted FISA to curtail these abuses, but President Reagan reintroduced the CIA-FBI partnership model in Executive Order 12,333.[319] The PATRIOT Act augments this type of partnership on an unprecedented scale. It also magnifies the potential for government violation of the individual's privacy. Section 905 of the PATRIOT Act requires that other agencies share with the Director of the CIA any "foreign intelligence" collected in the course of federal criminal law investigations, unless the Attorney General makes exceptions.[320]

Under section 203, sensitive personal, political, and business information about any individual or company collected in the course of a grand jury, domestic law enforcement wiretap, or any other criminal investigation must now be disclosed to any intelligence, defense, and national security agency if the information involves foreign intelligence.[321]

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to "authorize warrantless wiretaps" to gather foreign intelligence in circumstances where the government incidentally overheard an American citizen's conversations).

316. Conrad, *supra* note 250, at 971; *see also* S. REP. NO. 94-755, at 97 (1976).

317. *See* Conrad, *supra* note 250, at 973-74 (discussing the CIA's exclusion from domestic operations).

318. *See id.* at 981-82 (discussing Exec. Order No. 12,3333 and other agreements that sought to improve the coordination between the CIA and the FBI).

319. *See id.* President Regan promulgated Executive Order 12,333 in 1981. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981). The order delegated to the Attorney General the power to approve the use for intelligence purposes, within the United States or against a United States person abroad, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such techniques shall not be undertaken unless the Attorney General has determined in each case that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power. *Id.*

320. USA PATRIOT Act, Pub. L. No. 107-56, § 905(a)(2), 115 Stat. 272, 389.

321. *See id.* § 203, 115 Stat. 272, 279-81. Foreign intelligence is defined as "information relating to the capabilities, intentions or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities." 50 U.S.C. § 401a(2) (2000). Foreign intelligence information includes "information about a United States person that concerns a foreign power or foreign territory and 'that relates to the national defense or the security of the United States.'" *See* 147 CONG. REC. S10990-02, S10992 (daily ed. Oct. 25, 2001).

Americans have generally felt free to conduct business and personal relationships with foreign governments or nationals and to express personal opinions about governmental policy without recourse. These communications could be entirely legal, but they could also fit the definition of foreign intelligence information. As such, the PATRIOT Act makes these communications eligible for broad dissemination to any government official.[322]

While prior law allowed information sharing between grand juries, the court supervised the disclosure of such information.[323] Section 203 does not provide such oversight of these information-sharing activities and does not limit the purposes for which the information can be disclosed. Section 203 creates a fundamental change in the existing criminal justice system, as Congress did not limit its scope to investigations about terrorism.

The indiscriminant sharing of information ignores the radically different purposes of the domestic criminal law system and that of foreign intelligence gathering.[324] Unlike domestic criminal law investigations, foreign intelligence surveillance may not consider the ultimate truth of the information collected as an objective. A disclosure of innuendo and inference may significantly harm an individual's reputation. A system that lacks checks and balances will likely disclose inaccurate or incomplete information.

In the course of an ordinary criminal investigation, the government may collect information on individuals not involved in any illegal activity. The lack of guidelines for using this information exacerbates the potential for misuse during any information-sharing activities.

> Many individuals are investigated and later cleared. Many cases are investigated and never prosecuted. Many witnesses are interviewed whose testimony never surfaces at trial. Immunity is granted to compel testimony before grand juries about people who are never indicted. Wiretaps and microphone "bugs" and computer communications intercepts pick up extensive information about activities and

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322. *See* 147 CONG. REC. S10990-02, S10992 (daily ed. Oct. 25, 2001).

323. *Id.* at S11005-06.

324. *See* S. REP. NO. 95-701, at 12-13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 3981.

> The criminal laws are enacted to establish standards for arrest and conviction; and they supply guidance for investigations conducted to collect evidence for prosecution. Foreign counterintelligence investigations have different objectives. They succeed when the United States can insure that an intelligence network is not obtaining vital information. . . . Prosecution is a useful deterrent, but only where the advantages outweigh the sacrifice of other interests. Therefore, procedures appropriate in regular criminal investigations need modification to fit the counterintelligence context.

Id.; *see also* Brown & Cinquegrana, *supra* note 248, at 133.

> opinions and personal lives that have no relevance to the criminal activity they are authorized to detect or monitor. [325]

The standard for the collection of this information requires only that investigators consider it "relevant to an investigation."[326] Despite this, section 203 allows broad disclosure within the law enforcement community of information falling under the heading of foreign intelligence or foreign intelligence information, further detaching it from its original relevance. The government could use information collected under FISA's relevance standard in a domestic criminal law investigation employing a probable cause standard. This would violate the rights of the individual. Without limitations on its retention, this information collection could lead to the return of the abuses of the 1970s with development of secret dossiers on individuals.

Section 218 of the PATRIOT Act amends the definition of the term "foreign intelligence information,"[327] which compounds the concerns over the broad dissemination of information about individuals under section 203. FISA provided a lowered standard for foreign intelligence surveillance, but restricted its use to circumstances where obtaining foreign intelligence data represented the sole or primary purpose of the investigation.[328] Section 218 of the PATRIOT Act amends FISA to apply in situations where foreign intelligence collection represents only a "significant purpose" of the investigation.[329]

The amendment further blurs the lines between acceptable foreign intelligence gathering on a reasonableness standard and the probable cause requirements of domestic criminal investigations. If the government conducts surveillance by wiretap for the purpose of obtaining information relevant to both a domestic criminal investigation and foreign intelligence activities, the government could avoid the probable cause requirements of Title III. The individual would lose vital privacy protection as a result. This "would be a significant alteration to the delicate constitutional balance that is reflected in the current legal regime governing electronic surveillance."[330]

F. Broad Access to Records and Other Items Under FISA

Section 215 of the PATRIOT Act amends FISA by giving the government the authority to require the production of "any tangible things (including books, records, papers, documents, and other items) for an

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325. 147 CONG. REC. S10990-02, S10992 (daily ed. Oct. 25, 2001).
326. *See id.*
327. USA PATRIOT Act, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291.
328. *See* EPIC, *supra* note 207.
329. USA PATRIOT Act, Pub. L. No. 107-56, § 218, 115 Stat. 272, 291.
330. *See* EPIC, *supra* note 207 (discussing a similar provision of a predecessor bill).

investigation to protect against international terrorism or clandestine intelligence activities."[331] Although narrowly circumscribed on its face, section 215 provides that the government conduct such investigations "under guidelines approved by the Attorney General under Executive Order No. 12,333."[332] This has potentially serious consequences for privacy.

Pursuant to Executive Order No. 12,333, "Agencies are not authorized to use such techniques as electronic surveillance, unconsented physical search, mail surveillance, physical surveillance, or monitoring devices unless they are in accordance with procedures established by the head of the agency concerned and approved by the Attorney General."[333] The fact that the procedures established by the Attorney General are themselves "not subject to review . . . by any public body" raises concerns. [334] The Order allows the Attorney General to authorize "any technique for which a warrant would [ordinarily] be required . . . [upon a unilateral judgment] that the technique is directed against a foreign power or an agent of a foreign power."[335] The lack of a definition for the term "agent of a foreign power" means that the characterization of the target falls exclusively within the discretion of the Attorney General as well.[336]

While the FBI must apply for an order to the special FISA court, the court will grant the order on less than probable cause.[337] The government need only certify that it seeks the records for an authorized investigation conducted pursuant to the Attorney General's procedures, and that the investigation intends to obtain foreign intelligence information, a very broadly defined term.[338] Since the Attorney General has the sole discretion to define the parameters of the investigation, the government obtains access to a broad range of private records in potential violation of the individual's privacy.

Section 905 of the PATRIOT Act further reduces the individual's sphere of privacy by requiring law enforcement agencies to share sensitive "foreign intelligence information" about Americans with intelligence agencies through the Director of the CIA, unless the Attorney General

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331. USA PATRIOT Act, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287.

332. *See id.* President Ronald Reagan issued Executive Order No. 12,333, which greatly expanded the authority of the Central Intelligence Agency to conduct domestic intelligence operations. *See* Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

333. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, § 2.4.

334. *See* Conrad, *supra* note 250, at 977.

335. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, § 2.5.

336. *See* Conrad, *supra* note 250, at 979.

337. *See supra* notes 292-301 and accompanying text for a discussion of FISA.

338. *See* definition of "foreign intelligence information," *supra* note 321.

makes exceptions.[339] As history has shown, such arrangements increase the potential for governmental overreaching.

Despite their descriptive titles, "foreign intelligence" and "foreign intelligence information" could include sensitive information about an individual's lawful business transactions, political relationships, and personal opinions concerning members of a foreign government.[340] The First and Fifth Amendments by virtue of the Fourth Amendment currently protect these activities. However, a legislative enactment that removes them from constitutional protection implies that society no longer recognizes the individual's subjective expectation of privacy in these records as legitimate.

Over the years, various Executive Orders have modified the express bar to domestic authority, but it would seem that any further extension to the CIA's domestic surveillance power would contravene its charter under the National Security Act.[341]

Section 506 of the PATRIOT Act gives concurrent jurisdiction to the Secret Service to investigate certain computer-related offenses under 18 U.S.C. § 1030.[342] This returns the Secret Service to the full authority it had before 1996 to investigate any and all violations of section 1030.[343] Ostensibly, this extension of authority allows the Secret Service to protect critical infrastructures from terrorist attacks.[344] Like many other provisions of the PATRIOT Act, Congress did not limit this change by the terms of the Act, and it becomes a permanent feature of our criminal laws.

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339. USA PATRIOT Act, Pub. L. No. 107-56, § 905(a)(2), 115 Stat. 272, 389; *see supra* text accompanying note 32; *see also* 147 CONG. REC. S10990-02, S10992 (daily ed. Oct. 25, 2001).

340. *See* definition of "foreign intelligence," *supra* note 321.

341. For instance, President Carter's Executive Order No. 12,036 prohibited surveillance against United States persons abroad. Exec. Order No. 12,036, 43 Fed. Reg. 3674, § 2-202 (Jan. 24, 1978). President Reagan's Executive Order No. 12,333, however, allows such surveillance "even if the CIA has no reason to believe the target is . . . an 'agent of a foreign power.'" *See* Conrad, *supra* note 250, at 978.

342. USA PATRIOT Act, Pub. L. No. 107-56, § 506(a), 115 Stat. 272, 367. In 1995, the Secret Service created the New York Electronic Crimes Task Force ("NYECTF"). *See* 147 CONG. REC. S10990-02, S10998 (daily ed. Oct. 25, 2001). This group includes members from industry law enforcement and academia and "has successfully investigated a range of financial and electronic crimes." *Id.* Section 105 of the PATRIOT Act authorizes the Secret Service to create similar task forces in other parts of the country. *Id.*

343. *See* 147 CONG. REC. S10990-02, S10998 (daily ed. Oct. 25, 2001). The 1996 amendments to section 1030 concentrated the authority of the Secret Service on specific sections of the Computer Fraud and Abuse Act. *Id.* Section 506 of the PATRIOT Act permits the Justice and Treasury Departments to work out the parameters of the new concurrent jurisdiction. *Id.*

344. *Id.*

G. Privacy Protection Under Title III (Wiretap Statute)

> *Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.*[345]

When first confronted with the issue of whether wiretapping violated the Fourth Amendment in *Olmstead v. United States*,[346] the Supreme Court held that wiretapping did not constitute a search.[347] However, even the majority recognized the danger of permitting unrestrained governmental surveillance and suggested a practical limitation to guard against governmental overreaching. The Court noted, "Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials."[348] The Court ultimately overturned the *Olmstead* decision in *Katz v. United States*.[349]

The Federal Communications Act of 1934 ("FCA")[350] did not explicitly adopt the Court's suggestion for the protection of privacy. However, some interpreted certain language in the FCA as statutory authority for the existence of the *Olmstead* exclusionary rule. Section 605 of the FCA provided, "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."[351] The Court interpreted section 605 to prevent testimony concerning the contents of wiretapped conversations in court because "to recite the contents of the message in testimony before a court [would be] to divulge the message."[352] The Court later held the exclu-

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345. *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting).

346. 277 U.S. 438.

347. *Id.* at 466. The Court provided two bases for its decision. First, there had been no entry of the premises that would give rise to a search. *Id.* Second, while the agents "captured" the content of the conversations, they had not acquired any physical objects that would constitute a seizure. *Id.* This trespass model was followed by the Court in a number of decisions, including *Goldman v. United States*, 316 U.S. 129 (1942) (placing a detectaphone against a wall of an adjoining office where the police were lawfully present did not constitute a trespass), and *On Lee v. United States*, 343 U.S. 747 (1952) (incriminating information from bug planted on an acquaintance of target by consent).

348. *Olmstead*, 277 U.S. at 465.

349. 389 U.S. 347, 353.

350. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934). The FCA was the first federal statute to establish procedural protections against electronic surveillance by the government.

351. *Id.* § 605, 48 Stat. 1064, 1068.

352. *Nardone*, 302 U.S. 379.

sionary rule applicable to derivative evidence,[353] to intrastate communications,[354] and to the actions of state officers.[355]

Section 605 frustrated both law enforcement and privacy advocates. It allowed private citizens and public officials to ignore its prohibitions, but banned the use of electronic surveillance in police investigations for even the most serious of federal offenses.[356] Since the FCA did not preempt state law, state criminal prosecutors could admit wiretaps that did not meet section 605's standards.[357] Finally, section 605 did not bar intelligence surveillance.[358] The government continued to use wiretaps to collect foreign intelligence for national security purposes.[359] The government supported this continued use with the rationale that it could lawfully "intercept" communications, but not "divulge" them.[360] Further, the government contended that it did not divulge information in its internal communications, but only if it released the information to an outside party.[361] Foreign intelligence surveillance rarely resulted in prosecution, leaving little chance that the government would divulge an intercepted communication.

Since no legislature had codified the *Olmstead* exclusionary rule, courts did not have to follow it. The sphere of the individual's privacy received uneven treatment in courts called upon to determine whether to admit or exclude evidence produced from wiretaps.[362] Recognizing the need for substantive restraint against police action, the courts ultimately upheld the validity of the exclusion. In *Lee v. Florida*,[363] the Court stated that the exclusionary rule was "counseled by experience."[364] The Court's research of section 605 violations had "failed to uncover a single reported prosecution of a law enforcement officer for a violation of s[ection] 605 since the statute was enacted."[365] The Court "concluded . . . that nothing short of mandatory exclusion of the illegal evidence [would]

353. *See* Nardone v. United States, 308 U.S. 338, 341 (1939).

354. *See* Weiss v. United States, 308 U.S. 321, 329 (1939).

355. *See* Benanti v. United States, 355 U.S. 96, 100 (1957).

356. WAYNE LAFAVE, CRIMINAL PROCEDURE 261 (3d ed. 2000).

357. *See* JAMES G. CARR, THE LAW OF ELECTRONIC SURVEILLANCE § 2.4(a) (2d ed. 1989).

358. *See* Herbert Brownell, Jr., *The Public Security and Wiretapping*, 39 CORNELL L.Q. 195, 197-99 (1954); John F. Decker & Joel Handler, *Electronic Surveillance: Standards, Restrictions and Remedies*, 12 CAL W. L. REV. 60, 63-64 (1975).

359. *See* Brownell, *supra* note 358, at 199.

360. *See id.* at 197.

361. *See* Decker & Handler, *supra* note 358, at 64.

362. *See* Lee v. Florida, 392 U.S. 378, 386-87 (1968) (evidence excluded); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (evidence excluded); *Benanti*, 355 U. S. at 105-06 (evidence excluded); Schwartz v. Texas, 344 U.S. 199, 203 (1952) (evidence admitted), *overruled by Lee*, 392 U.S. at 386-87; Wolf v. Colorado, 338 U.S. 25, 33 (1949) (evidence admitted), *overruled by Mapp*, 367 U.S. at 660.

363. 392 U.S. 378.

364. *Lee*, 392 U.S. at 386.

365. *Id.*

compel respect for the federal law 'in the only effectively available way -- by removing the incentive to disregard it.'"[366]

In addition to these failings, it became clear that section 605 could not keep pace with the advances in surveillance technology.[367] In order to balance law enforcement's need to use the latest technology with the individual's right to some degree of privacy, Congress enacted Title III.[368] Congress intended Title III to protect privacy by defining a uniform procedure for the "interception of wire and oral communications."[369] Only a "court of competent jurisdiction" could authorize such interception.[370] In this manner, the statute safeguarded the privacy of innocent persons who had not consented to the interception of their wire or oral communications.[371] As additional protection, Congress required that the interception remain under the control and supervision of the authorizing court.[372]

Section 2518 provided a template for obtaining court-approved interception and listed the contents of a valid application for court ordered surveillance.[373] It also restricted the scope and duration of the surveillance.[374] Title III provided several layers of privacy protection. A court would issue a warrant for the interception if the government met the provision's detailed probable cause requirements.[375] The standard under Title III required probable cause to believe that "an individual [was] committing, ha[d] committed, or [was] about to commit" one of the enumerated offenses, and that "particular communications concerning that offense [would] be obtained through such interception."[376] It required that the order state with specificity the target's identity, the location of the interception, the identity of the agency authorized to intercept,

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366. *Id.* at 386-87 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

367. *See* LAFAVE, *supra* note 356, at 260.

368. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended at 18 U.S.C. §§ 2510-2520 (2000)). Title III was part of the Omnibus Crime Control and Safe Streets Act of 1968. Congress noted that "there [had] been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversations." *Id.* § 801, 82 Stat. 197, 374-75.

369. *Id.*

370. *Id.*

371. *See id.*

372. *Id.*

373. *Id.* § 802, 82 Stat. 197, 261-62.

374. *Id.* § 802, 82 Stat. 197, 263.

375. *Id.* § 802, 82 Stat. 197, 262. Under Title III, a judge could order a wiretap if he determined, among other things, that probable cause existed to believe "that an individual is committing, has committed, or is about to commit" one of the enumerated offenses and "the facilities from which, or the place where, the . . . communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person." *Id.*

376. *Id.*

and the identity of the person authorizing the interception.[377] It also required a statement of whether the interception must cease immediately upon obtaining the communication described in the application.[378] Strict duration requirements also attached.[379]

This heightened probable cause requirement reflected the heightened privacy intrusion presented by wiretaps.[380] Wiretaps differ from physical search warrants in that the orders allow continuing surveillance for up to 30 days with possible extensions.[381] The government could overhear all conversations transpiring during that period without regard to relevancy.[382] "Only the most precise and rigorous standard of probable cause should justify an intrusion of this sort."[383] The failure to obtain an order would result in the invalidation of even narrowly tailored surveillance.[384]

However, Title III carved out an exemption for wiretapping performed in the pursuit of foreign intelligence gathering.[385] It did not limit the constitutional power of the President to "obtain[ing] foreign intelligence information deemed essential to the security of the United States, or to protect[ing] national security information against foreign intelligence activities."[386] Restrictions on the executive's use at trial of information obtained pursuant to this section provided additional privacy protection. The government could use the information only if the "interception was reasonable," and it could not otherwise disclose the information except as necessary for the executive to implement his power to protect the nation.[387]

Over the years, Congress added three additional sections, 2511, 2515, and 2520, to provide remedies for violations of Title III. These sections provided for criminal sanctions,[388] injunctive relief,[389] civil remedies,[390] and the right to exclude the contents of the illegally obtained

377. *Id.* § 802, 82 Stat. 197, 263.

378. *Id.*

379. *Id.*

380. *See Berger*, 388 U.S. at 58-63.

381. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 263.

382. *But see* discussion on Carnivore, *supra* note 240.

383. *See Berger*, 388 U.S. at 69 (Stewart, J., concurring).

384. *Katz*, 389 U.S. at 354 ("surveillance was so narrowly circumscribed that a duly authorized magistrate, . . . clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place").

385. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 257. This exemption has particular significance to some of the provisions of the PATRIOT Act.

386. *Id.*

387. *Id.*

388. 18 U.S.C. § 2511(4) (2000).

389. *Id.* § 2511(5).

390. *Id.* § 2520.

communications from evidence.[391] According to the U.S. Attorney statistics, these remedies have not hindered the government's surveillance ability.[392]

H. Expansion of Government Ability to Intercept Communication Under FISA

Title III provided several layers of privacy protection to the individual because of the intrusive nature of electronic surveillance. Before the PATRIOT Act, FISA did not significantly deter government surveillance if the information sought fell under the heading of foreign intelligence. The PATRIOT Act's amendments to FISA weaken even those restrictions.

FISA required the government to certify that the targeted communication came from an individual engaging in international terrorism or an agent of a foreign power.[393] Section 214 of the PATRIOT Act eliminates this requirement.[394] This means that the government could justify surveillance with a pen register/trap and trace device by alleging that it intended to use the device in "any investigation to obtain foreign intelligence information,"[395] a much more lax standard. This circumvents FISA's limited protection against governmental intrusions and undercuts the reasons for a lowered standard for governmental surveillance.[396] This amendment allows the government to perform searches for customary purposes, but without the protection of the probable cause requirement in regular criminal investigations.

I. Multi Point (Roving Wiretap) Authority

Section 206 of the PATRIOT Act amends FISA to include "roving" wiretap authority. Roving wiretaps for domestic criminal law investigations require third parties "'specified in court-ordered surveillance' to provide assistance . . . to accomplish the surveillance" on a communica-

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391. *Id.* § 2515. This section codifies the *Olmstead* exclusionary rule. *See Olmstead*, 277 U.S. at 468, *overruled in part by Berger*, 388 U.S. 41 and *Katz*, 389 U.S. 347.

392. As stated by Justice Holmes in his dissent in *Olmstead*, "[I]t [is] a less evil that some criminals should escape than that the government should play an ignoble part." *See Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting).

393. 50 U.S.C. § 1842(c)(3) (2000).

394. USA PATRIOT Act, Pub. L. No. 107-56, § 214, 115 Stat. 272, 286.

395. *Id.*

396. Electronic Privacy Info. Ctr., *Foreign Intelligence Surveillance Act (FISA)*, *at* http://www.epic.org/privacy/terrorism/fisa/ (last visited Nov. 10, 2002) [hereinafter EPIC FISA].

> That laxity is premised on the assumption Congress and the courts should not unduly restrain the Executive branch, in pursuit of its national security responsibilities to monitor the activities of foreign powers and their agents. The removal of the "foreign power" predicate for pen register/trap and trace surveillance upsets that delicate balance.

Id.

tion as it moves through a succession of carriers and devices, i.e., roves.[397] Pursuant to section 206 of the PATRIOT Act, the FISA roving wiretap order need not identify the third party if the "[c]ourt finds that the actions of the target . . . may have the effect of thwarting the identification of a specified person."[398] The proposed change would extend the obligation to assist the government "to unnamed and unspecified third parties."[399] Upon the discovery of a new carrier, the government would present it with a generic wiretap order and "effect FISA coverage as soon as technically feasible."[400] The PATRIOT Act has very little of the protections afforded under Title III.

The PATRIOT Act particularly threatens the privacy of individuals who access the Internet through public facilities, such as libraries and university computer labs.[401] "Upon the suspicion that an intelligence target might use such a facility, the FBI [could] . . . monitor all communications transmitted at the facility."[402] There exists a high probability that the government could intercept "the private communications of law-abiding . . . citizens" since "the recipient of the assistance order . . . would be prohibited from disclosing the fact that monitoring is occurring."[403]

CONCLUSION

Surveillance technology will invariably advance and terrorists will invariably use those advancements. No one would suggest that the government should not use the most current technology to prevent tragedy. However, protection does not mean that we should abandon traditional notions of privacy. As a society, we may choose to cede more of our civil liberties so as to prevent another 9/11, but we should not make this decision lightly or without fully understanding what we put at risk.

Interpreting the Fourth Amendment to cover both physical and non-physical governmental intrusions, the courts balanced the government's need to search purportedly private areas with the individual's need to prevent government intrusion.[404] The complex system of safeguards de-

397. *See* EPIC, *supra* note 207.

398. USA PATRIOT Act, Pub. L. No. 107-56, § 206, 115 Stat. 272, 282.

399. EPIC, *supra* note 207.

400. *Id.*

401. *See* EPIC FISA, *supra* note 396.

402. *See id.*

403. *See id.*

404. *See generally* Kyllo v. United States, 533 U.S. 27 (2001) (holding that sense-enhancing surveillance technology intrudes upon minimum expectation of privacy protected under the Fourth Amendment); United States v. Karo, 468 U.S. 705 (1984) (placing unmonitored surveillance device to track use of drug extracting equipment did not violate Fourth Amendment because it did not intrude on reasonable expectation of privacy); Katz v. United States, 389 U.S. 347 (1967) (holding that defendant justifiably relied on privacy of public telephone booth and that it would be free from unwarranted electronic surveillance by government); Carroll v. United States, 267 U.S. 132 (1925)

veloped to support the Fourth Amendment provides evidence of the nation's resolve to maintain that balance. Judicial oversight balanced the needs of the government with the privacy interests of citizens by enforcing the requirement for warrants and by assessing the reasonableness of searches performed. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 established the procedural guidelines for the use of wiretapping and electronic eavesdropping by law enforcement agencies.[405] Exclusionary rules created an incentive for law enforcement officials to obey these constraints by precluding the suppression of evidence properly obtained through the use of warrants.[406] The Electronic Communications Privacy Act gave procedures for obtaining access to stored electronic communications (e-mail).[407]

Removal of the checks and balances on governmental action by the PATRIOT Act could diminish the already waning protection afforded by the Fourth Amendment. By increasing the scope of information subject to government access and reducing the independent judicial review of the government's actions, the PATRIOT Act lowered the threshold for legitimate governmental intrusion into the individual's privacy under the Fourth Amendment.

> [I]f the government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation or [sic] privacy regarding their homes, papers, and effects. . . . In such circumstances, where an individual's subjective expectations had been "conditioned" by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth amendment protection was.[408]

Without Congressional oversight, the PATRIOT Act could render the Fourth Amendment impotent as a guardian of civil liberty in domestic criminal law investigations. In the words of Ben Franklin, one of the

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(holding that the government must show probable cause to seize vehicles for transport of liquor in the absence of a warrant to protect motorist's freedom from seizure under Fourth Amendment).

405. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended at 18 U.S.C. §§ 2510-2520 (2000)). The Electronic Communications Privacy Act of 1986 amended Title III by including such electronic communications as digitally transmitted conversations, electronic mail, cellular telephones and pen registers. *See* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986).

406. FED. R. CRIM. P. 41.

407. 18 U.S.C. § 2703 (Supp. IV 1987).

408. Smith v. Maryland, 442 U.S. 735, 741 n.5 (1979).

founding fathers of this nation, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[409]

409. Benjamin Franklin, *Historical Review of Pennsylvania*, *in* JOHN BARTLETT, FAMILIAR QUOTATIONS 310 (Justin Kaplan ed., 16th ed. 1992).

REGULATING VIRTUAL CHILD PORNOGRAPHY IN THE WAKE OF *ASHCROFT V. FREE SPEECH COALITION*

INTRODUCTION

The United States Supreme Court, with its decision in *Ashcroft v. Free Speech Coalition*,[1] rejected cries from proponents of the regulation of virtual child pornography and held two provisions of the Child Pornography Prevention Act of 1996 ("CPPA")[2] unconstitutional.[3] Refusing to incorporate the CPPA's ban on virtual child pornography under either the *Miller v. California*[4] or *New York v. Ferber*[5] standards, the Court left open the status of virtual child pornography as constitutionally protected speech under the First Amendment.[6] In response to the Supreme Court's decision in *Free Speech Coalition*, Representative Mark Foley claimed that the Supreme Court "sided with pedophiles over children."[7] While Representative Foley's statement may grossly overstate the decision,[8] some serious questions remain as to the government's ability to regulate virtual child pornography in the wake of *Free Speech Coalition*.[9]

Rather than questioning the propriety of the Court's decision in *Free Speech Coalition*, this comment will focus on the future of virtual child pornography legislation in the aftermath of the Court's ruling. Part I will examine the legal framework the Supreme Court used to decide *Free Speech Coalition*. Part II will focus on the Court's decision in *Free Speech Coalition*, highlighting the problem with fitting virtual child pornography into the rubric of *Ferber*. Finally, Part III will critically examine Congress's response to the Court's decision and will propose possibilities for redrafting a statute to comply with the precedents set in both *Free Speech Coalition* and *Miller*.

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1. 535 U.S. 234 (2002).

2. Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2241, 2243, 2251, 2252, 2252A, 2256 (1996) & 42 U.S.C. § 2000aa (1996). For the purposes of this paper, citations will be to CPPA, 18 U.S.C.

3. *Free Speech Coalition*, 535 U.S. at 258 (The Court found two of the CPPA's provisions unconstitutional: 18 U.S.C. § 2256(8)(B)'s prohibition of material that "appears to be" of a minor engaging in sexually explicit conduct and 18 U.S.C. § 2256(8)(D)'s prohibition of sexually explicit material that "conveys the impression" that it is of a minor engaged in sex).

4. 413 U.S. 15 (1973).

5. 458 U.S. 747 (1982).

6. *See Free Speech Coalition*, 535 U.S. at 256.

7. *See* John Schwartz, *Swift, Passionate Reaction to a Pornography Ruling*, N.Y. TIMES, Apr. 17, 2002, at A18.

8. *See* Stephen V. Treglia, *Lawyers and Technology: After* Ashcroft *Is Virtual Child Porn A Crime?*, 228 N.Y. L.J. 5 (2002), *available at* WESTLAW ALLNEWS library (claiming that reading *Free Speech Coalition* to hold that virtual child pornography is now an area of protected speech is misguided).

9. *Id.*

I. BACKGROUND

The First Amendment demands that "Congress shall make no law . . . abridging the freedom of speech."[10] Unless speech falls into one of the categories accepted as being outside the First Amendment's veil of protection, that speech is presumed to be protected.[11] The government may constitutionally regulate speech that does not fit within the defined categories deserving of First Amendment protection.[12] To do so, the government must show a compelling government interest making the legislation necessary and demonstrate that the statute is narrowly tailored to achieving that interest.[13] Finally, even if a statute is narrowly tailored to accomplish a compelling government interest, the statute may still be unconstitutional if it is overbroad, thus proscribing a substantial amount of protected speech.[14]

Free Speech Coalition questions whether virtual child pornography fits into one of the categories outside of First Amendment protection, namely, child pornography.[15] The Court's analysis focused on whether Congress narrowly tailored the CPPA to accomplish the goal of protecting children.[16] Overbreadth was also addressed in the Court's interpretation of the CPPA in *Free Speech Coalition.*[17] The Court's decision in *Free Speech Coalition* demonstrates the judicial struggle and competing interests involved in reconciling regulation of pornography within the bounds of the First Amendment. In evaluating the CPPA's prohibition of virtual child pornography, the Court squarely faced the problem of fitting virtual child pornography into existing First Amendment law.[18]

This section will examine the Court's most notable attempt at defining obscenity law in *Miller v. California,*[19] as well as the Court's efforts to carve out a separate category of unprotected speech for child pornography in *New York v. Ferber.*[20] Following the discussion of the cases, this section will also outline the CPPA provisions at issue in *Free Speech*

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10. U.S. CONST. amend. I.

11. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.").

12. *Free Speech Coalition*, 535 U.S. at 245-46.

13. Content-based speech is judged under strict scrutiny. Some commentators have argued that the appropriate standard of review in *Free Speech Coalition* should be the balancing of interests test. This inquiry is beyond the scope of this Comment. For more information, see Wade T. Anderson, Comment, *Criminalizing "Virtual" Child Pornography Under the Child Pornography Prevention Act: Is It Really What It "Appears to Be?,"* 35 U. RICH. L. REV. 393, 418-20 (2001).

14. *See generally* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

15. *Free Speech Coalition*, 535 U.S. at 240.

16. *Id.* at 252-54.

17. *Id.* at 255-57.

18. *Id.* at 239-40.

19. 413 U.S. 15 (1973).

20. 458 U.S. 747 (1982).

Coalition. Finally, this section will briefly summarize the circuit courts' struggles in interpreting the CPPA and the disparate results that led to the Court's decision to grant certiorari.

A. Miller v. California[21]

In *Roth v. United States*,[22] the Supreme Court held that obscenity, as a category of speech, falls outside the boundaries of First Amendment protection.[23] Between *Roth*, in 1957, and the Court's decision in *Miller v. California*, in 1973, the Court struggled to define obscenity and develop a workable standard for identifying obscene speech.[24] In fact, before the *Miller* decision, even members of the Court expressed difficulty defining obscenity. In his concurring opinion in *Jacobellis v. Ohio*,[25] Justice Stewart wrote, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ."[26] The struggle over the definition of obscenity continued for nearly a decade without any clear standard for identifying unprotected obscenity.

Miller v. California marked the culmination of the Supreme Court's attempts to determine the boundary between speech worthy of First Amendment protection and unprotected obscenity.[27] *Miller* delineates the current standard of acceptable regulation of what Justice Harlan called "the intractable obscenity problem."[28] In that case, the State of California charged the defendant, Miller, with a misdemeanor for knowingly distributing obscene materials in violation of California law.[29] Miller was

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21. 413 U.S. 15 (1973).

22. 354 U.S. 476 (1957).

23. *Roth*, 354 U.S. at 484-85 (The Court found that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." Thus, the Court concluded that "obscenity is not within the area of constitutionally protected speech or press.").

24. *See* Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966).

25. 378 U.S. 184 (1964).

26. *Jacobellis*, 378 U.S. at 197 (Stewart, J., concurring).

27. *Miller*, 413 U.S. at 16.

28. *Id.* at 16 (citing Interstate Circuit Inc. v. Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring and dissenting)).

29. *Id.* at 16-18. The defendant was charged under a California statute that provided in relevant part:

> § 311.2. Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state:
>
> (a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

charged after he allegedly sent an unsolicited brochure containing explicit pictures and drawings of men and women engaging in sexual activities to a restaurant owner and his mother.[30] Finding that the State had a legitimate interest in prohibiting distribution of obscene material, the Court concluded that a state may constitutionally regulate obscenity without violating the First Amendment.[31]

The Court limited the scope and definition of obscenity to apply only to material depicting or describing sexual conduct.[32] The Court also found that for a regulation to be constitutional it must be "specifically defined" in the statute.[33] Finally, if the material challenged fits within these guidelines, then the reviewing court would examine under the following test, which required that "[a] state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[34] This test for obscenity, outlined in *Miller*, remains the constitutional standard required of all obscenity statutes. However, almost a decade later, the Court determined that obscenity laws were insufficient to regulate some types of indecent material, namely child pornography.[35]

B. New York v. Ferber[36]

Paul Ferber was criminally charged under a New York obscenity statute after he sold pornographic films showing young boys masturbating to an undercover police officer.[37] The statute prohibited the knowing promotion of sexual performances by minors by distribution of material depicting such performances.[38] The New York Court of Appeals found

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> § 311. Definitions
> As used in this chapter:
> (a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

Id. (citing CAL. PENAL CODE § 311 (1968)).

30. *Miller*, 413 U.S. at 18.
31. *Id.* at 18-20.
32. *Id.* at 24.
33. *Id.*
34. *Id.*
35. *See Ferber*, 458 U.S. at 765.
36. 458 U.S. 747.
37. *Id.* at 751-52.
38. *Id.* at 751. At issue in *Ferber* was New York Penal Law § 263.15. In relevant part, the statute read: "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes

the statute unconstitutional because it failed to delineate the *Miller* requirements for obscenity.[39] However, in 1982, the Supreme Court reversed, deciding that the First Amendment did not protect child pornography, and that a state could regulate the distribution of child pornography wholly apart from the *Miller* obscenity standard.[40]

Upholding New York's regulation of child pornography, the Court focused primarily on the harm to children created by the production of child pornography.[41] The Court adopted five justifications for allowing states greater latitude in regulating child pornography.[42] First, the Court found that the production of child pornography was intrinsically related to the sexual abuse of children.[43] Second, the Court determined that sexually explicit material using children created a permanent record of the abuse, which would harm the participants each time it was distributed.[44] In addition, the Court concluded that the State's interest in protecting children from sexual exploitation in the creation of child pornography could only be controlled by prohibiting the distribution of pornographic materials produced using children.[45] Third, the Court recognized that the sale and distribution of child pornography sustained the market for these kinds of materials and continued the exploitation of children in production of pornography.[46] Fourth, the Court defended the statute's proscription of speech on the ground that child pornography was of only *de minimis* value.[47] Importantly, the Court noted that the First Amendment protects the use of adult simulation if the depiction of children engaging in sexually explicit conduct is necessary to add literary, artistic, political, or scientific value to a work.[48] And fifth, the Court found that the earlier precedent did not preclude the exclusion of child pornography as an unprotected category of speech.[49]

The Court concluded that states could constitutionally regulate child pornography without regard to the *Miller* obscenity requirements because of the harm to children intrinsic in the production of child pornography.[50] Justice White wrote, "The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular

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sexual conduct by a child less than sixteen years of age." "'Promote' means to procure, manufacture, issue, sell." *Id.* (citing N.Y. PENAL LAW § 263 (1977)).

39. New York v. Ferber, 422 N.E. 2d 523, 525-26 (N.Y. 1981).
40. *Ferber*, 458 U.S. at 764-65.
41. *Id.* at 759-60.
42. *Id.* at 756-64.
43. *Id.* at 756.
44. *Id.* at 759.
45. *Id.*
46. *Id.* at 761-62.
47. *Id.* at 762.
48. *Id.* at 762-63.
49. *Id.* at 763.
50. *Id.* at 756.

and more compelling interest in prosecuting those who promote the sexual exploitation of children."[51] Thus, the Court upheld the New York statute as constitutional, and in doing so, created a new category of speech beyond the bounds of First Amendment protection.[52] Federal laws passed in the wake of *Ferber*'s ban on child pornography were largely useful in combating child pornography. However, with the dawn of the Internet and technological advances that led to the increasing availability of child pornography in cyberspace, existing federal laws have become increasingly impotent in dealing with the new technology.[53]

C. The Child Pornography Prevention Act of 1996

Before the enactment of the CPPA in 1996, Congress attempted to regulate child pornography under a variety of statutes.[54] However, with advances in computer technology, the existing law left loopholes for computer-generated images of children engaging in sexual acts, now commonly known as virtual child pornography.[55] Congress addressed the growth of virtual child pornography in 1996 by enacting the CPPA, including thirteen legislative findings regarding the ills of virtual pornography, in an attempt to fill the void left by existing laws.[56]

To combat virtual child pornography, Congress amended the definition of "child pornography" to include computer-generated images of minors engaging in sexually explicit conduct.[57] With regard to virtual images specifically, the CPPA defined child pornography *inter alia* as:

> any visual depiction, including any . . . computer-generated image . . . where--
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> . . . .
>
> (B) such visual depiction is, or *appears to be*, of a minor engaging in sexually explicit conduct . . . ;
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> . . . .
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that *conveys the*

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51. *Id.* at 761.

52. *Id.* at 773-74.

53. *See* Anderson, *supra* note 13, at 402.

54. *See id.* at 396-98 (discussing legislative attempts at regulating child pornography since the 1970s).

55. *Id.* at 402 (Existing laws covered only pornography produced using real children, thus leaving a loophole for virtual child pornography. Furthermore, prosecutors had a difficult task in convicting pornographers because the defendant could always provide reasonable doubt by suggesting the material was produced using only virtual children.).

56. *Id.* at 403.

57. CPPA, 18 U.S.C § 2256(8) (1996).

> *impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.[58]

The "appears to be" clause and the "conveys the impression" clause are the provisions that were specifically at issue in *Free Speech Coalition*.[59]

D. Circuit Courts' Interpretation of the CPPA

Since the CPPA's enactment in 1996, five cases, including *Free Speech Coalition*, have made their way to federal appellate courts.[60] The First, Fourth, Fifth, and Eleventh Circuits upheld the constitutionality of the CPPA.[61] Conversely, the Ninth Circuit, in *Free Speech Coalition v. Reno*,[62] found that the CPPA failed to serve a compelling government interest and was unconstitutionally vague and overbroad.[63]

Each of the four circuits that upheld the CPPA's constitutionality did so, in part, by extending the rationale of *Ferber* and its progeny.[64] These courts concluded that the secondary harm associated with virtual child pornography was sufficient justification for limiting virtual images.[65] However, the Ninth Circuit refused to accept that there was a "nexus"[66] between virtual child pornography and harm to children. Thus, the Ninth Circuit declined to enlarge *Ferber* to include a constitutional prohibition on virtual child pornography.[67]

As written, the CPPA does not fit neatly within the *Miller* obscenity standard. Nor does the CPPA's ban on *virtual* child pornography follow directly from the holding and rationale in *Ferber*. With the lower courts diametrically opposed on the constitutionality of the CPPA, the time was ripe for a final decision on congressional ventures into regulating virtual

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58. *Id.* (emphasis added).

59. *Free Speech Coalition*, 535 U.S. at 241-42. Section 2256(8)(C) was not challenged by the Coalition, but the majority opinion notes that it will likely fall under the *Ferber* standard since there is harm to actual children in the distribution of morphed images. *See* Anderson, *supra* note 13, at 404 (Section 2252 was also amended to incorporate the definitions of § 2256 in criminalizing the "use of a minor engaging in sexually explicit conduct.").

60. *See* United States v. Fox, 248 F.3d 394 (5th Cir. 2001); United States v. Mento, 231 F.3d 912 (4th Cir. 2000); Free Speech Coalition v. Reno, 198 F.3d 1083 (9th Cir. 1999); United States v. Acheson, 195 F.3d 645 (11th Cir. 1999); United States v. Hilton, 167 F.3d 61 (1st Cir. 1999).

61. *See Fox*, 248 F.3d 394; *Mento*, 231 F.3d 912; *Acheson*, 195 F.3d 645; *Hilton*, 167 F.3d 61.

62. 198 F.3d 1083.

63. *Id.* at 1096.

64. *See Fox*, 248 F.3d at 401; *Mento*, 231 F.3d at 919-20; *Acheson*, 195 F.3d at 650; *Hilton*, 167 F.3d at 69-71. The circuits were split not only as to the statute's constitutionality, but also as to an appropriate standard of review. This inquiry is beyond the scope of this Comment and will not be addressed.

65. *Fox*, 248 F.3d 394; *Mento*, 231 F.3d at 912; *Acheson*, 195 F.3d at 645; *Hilton*, 167 F.3d at 61.

66. *See Free Speech Coalition*, 198 F.3d at 1094.

67. *Id.* at 1092.

child pornography. Thus, the Court granted certiorari to *Free Speech Coalition* to quiet the debate.[68]

II. *ASHCROFT V. FREE SPEECH COALITION*[69]

A. Facts

The Free Speech Coalition ("the Coalition"), a California trade organization consisting of businesses in the adult entertainment industry, artists, and authors, brought this facial challenge to the CPPA.[70] Though none of the groups or individuals who challenged the statute had been charged, the Coalition feared their "adult-oriented" work might fall under the prohibitions on virtual child pornography as defined by the CPPA.[71] Thus, the Coalition brought suit seeking declaratory and injunctive relief on the ground that the CPPA was vague and overbroad.[72]

The respondents brought the case, originally captioned as *Free Speech Coalition v. Reno*,[73] in federal court in California. The district court granted summary judgment in favor of the government.[74] In 1999, the Ninth Circuit reversed the decision of the district court, holding that the CPPA was an unconstitutional ban on free speech protected under the First Amendment.[75] The Supreme Court granted certiorari in 2001.[76]

B. The Majority Opinion

With the split among the circuit courts, *Free Speech Coalition* presented the Court with an opportunity to settle the question over the proper placement of virtual child pornography within the rubric established by *Miller*, *Ferber*, and their progeny.[77] Faced with this challenge, the Court refused to equate the CPPA's ban on virtual child pornography with the constitutionally permissible prohibition on real child pornography under *Ferber* or obscenity under *Miller*.[78] Moreover, the majority rejected the government's assertion of any compelling interest justifying

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68. Ashcroft v. Free Speech Coalition, 531 U.S. 844 (2001).
69. 535 U.S. 234 (2002).
70. *Free Speech Coalition*, 535 U.S. at 234.
71. *Id.*
72. *See* Free Speech Coalition v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999).
73. No. C 97-0281VSC, 1997 WL 487758, at *1 (N.D. Cal. Aug. 12, 1997).
74. *Free Speech Coalition*, 1997 WL 487758, at *7.
75. Free Speech Coalition v. Reno, 198 F.3d 1083, 1086 (9th Cir. 1999).
76. Ashcroft v. Free Speech Coalition, 531 U.S. 844 (2001).
77. *See* Osborne v. Ohio, 495 U.S. 103 (1990) (upholding an Ohio statute criminalizing possession of child pornography by extending *Ferber* to include limiting the market for child pornography and protecting victims from ongoing showing of pornography); New York v. Ferber, 458 U.S. 747 (1982); Miller v. California, 413 U.S. 15 (1973).
78. *Free Speech Coalition*, 535 U.S. at 240.

regulation of virtual child pornography under the CPPA.[79] Finally, the Court ruled that the CPPA, as written, was overbroad and thus unconstitutional, as a substantial amount of protected speech could be chilled under the statute.[80]

First, the Court found that the CPPA could not be interpreted as a supplement to the constitutional proscription of obscenity under *Miller*.[81] The Court found that the CPPA failed to include any connection between the prohibited work and community standards of offensiveness.[82] In addition, the Court determined that the CPPA did not act as a supplement to existing obscenity standards because it failed to account for the work's literary, scientific, artistic, or political value.[83]

Second, the Court refused to extend *Ferber*'s ban on pornography produced using real children to include the CPPA's prohibition on all virtual child pornography.[84] As discussed above, constitutionally permissible regulation of real child pornography under the *Ferber* line of cases was originally justified because of the primary harm to children affected during the production of child pornography.[85] In the words of Justice Kennedy, "The production of the work, not its content, was the target of the statute."[86]

Interpreting the *Ferber* holding and rationale narrowly, the Court concluded that the CPPA's ban on virtual child pornography was not simply an augmentation of *Ferber* necessitated by technological advances. Rather, the Court determined that, unlike *Ferber*, "the harm" from virtual child pornography "does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts."[87] This reasoning suggests that the Court will likely be unwilling to accept the constitutionality of any legislative attempt to limit virtual child pornography under *Ferber* and its progeny.

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79. *Id.* at 251-55.

80. *Id.* at 256.

81. *Id.* at 251 (citing *Miller*, 413 U.S. at 24) (Under the *Miller* obscenity test, the government must show that, taken as a whole, the work in question: 1) appeals to the prurient interest; 2) is patently offensive in light of community standards; and 3) lacks any serious literary, artistic, political, or scientific value.).

82. *Id.* at 246.

83. *Id.*

84. *Id.* at 251.

85. The *Ferber* Court grounded its ruling to permit regulation of child pornography beyond the confines of *Miller* because of the intrinsic harm to children in the production of child pornography. *Ferber*, 458 U.S. at 759. Conversely, in virtual child pornography, the impact on children is secondary, i.e., child pornography whets the appetites of pedophiles or may be used by a pedophile as an aid to lure children. *Free Speech Coalition*, 535 U.S. at 242.

86. *Free Speech Coalition*, 535 U.S. at 249.

87. *Id.* at 250.

After concluding that the CPPA did not fit within any of the constitutional categories of *per se* unprotected speech, the Court rejected the government's assertions that the CPPA was narrowly tailored to serve a compelling interest.[88] The government presented four arguments aimed at convincing the Court that the CPPA should be upheld. Though the reasoning is somewhat intertwined, the Court rejected each of these claims, finding that two of the assertions failed strict scrutiny and two suffered from overbreadth by prohibiting a substantial amount of protected speech.[89]

The government argued that the CPPA was necessary to prevent pedophiles from using virtual child pornography to seduce children.[90] The Court found this argument unpersuasive for two reasons. First, the Court concluded that a pedophile might use many things, including video games and candy, to seduce children.[91] Second, the Court found that other laws, such as those that prohibit unlawful solicitation of a minor, more closely regulate the unsavory use of virtual pornography.[92] Thus, according to the majority, the CPPA was not narrowly tailored because the protection of children from pedophiles might be accomplished through less restrictive means.[93]

In addition to being needlessly restrictive, the Court also found that the CPPA failed to serve the government's compelling interest of protecting children from pedophiles.[94] Justice Kennedy wrote, "The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question."[95] The Court similarly rejected the government's argument that virtual child pornography "whets the appetites of pedophiles."[96] Again citing the apparent disconnect between pornography and conduct, the Court concluded that a tendency to cause illegal conduct was an insufficient justification for limiting speech.[97] The majority's rejection of the government's asserted interests in protecting children from pedophiles highlights the Court's wariness to accept the causal connection between virtual child pornography and harm to children.[98]

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88. *See id.* at 252.
89. *Id.* at 256.
90. *Id.* at 251.
91. *Id.*
92. *Id.* at 251-52.
93. *Id.* at 252.
94. *Id.* at 253.
95. *Id.* at 252.
96. *Id.* at 253.
97. *Id.* at 253-54.
98. *Id.* at 244-46.

In addition to repudiating arguments based on the assumption that virtual child pornography enhances the likelihood of pedophilia, the Court also rejected the government's assertions that the CPPA was needed to enforce existing laws regulating child pornography.[99] The government made two arguments, both rejected, aimed at convincing the Court of the CPPA's necessity to ensure enforcement of *Ferber*'s ban on child pornography.[100] Both arguments centered on the premise that virtual child pornography is indistinguishable from pornography using real children.[101]

First, the government claimed that because virtual child pornography and actual child pornography are part of the same market, the Court should extend the *Ferber* and *Osborne* rationales to include virtual child pornography.[102] This would allow the government to better enforce the existing ban on real child pornography by eliminating the market.[103] The Court found this argument unpersuasive, reasoning that if the two were truly indistinguishable, there would be no market for real child pornography, as potential offenders could avoid prosecution by simply using virtual images.[104]

Additionally, the government argued that technological advances have made real and virtual pornography indistinguishable, in turn making prosecution of real child pornographers impossible.[105] In answer to both of the enforcement arguments, the Court found that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech."[106] Citing *Broadrick v. Oklahoma*,[107] the Court concluded that the CPPA was overbroad because it regulated a substantial amount of constitutionally permissible speech.[108]

Though the government asserted the statute's inclusion of an affirmative defense as a remedy to the overbreadth problem, the Court found that the affirmative defense proved incomplete.[109] The defense allowed a defendant to escape prosecution if he could prove that the materials were produced using adults and that they were not distributed in a way that conveyed the impression that the material showed real children.[110] The Court found, however, that since the statute only permitted

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99. *Id.* at 254.
100. *See id.* at 249-54.
101. *Id.* at 249, 254.
102. *Id.* at 254.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 255.
107. 413 U.S. 601 (1973).
108. *See Free Speech Coalition*, 535 U.S. at 255-56 (citing *Broadrick*, 413 U.S. at 612).
109. *Id.* at 256.
110. *Id.* at 255.

such a defense for distributors, but not possessors, a significant amount of protected speech would be restricted in the CPPA's attempt to distinguish real from virtual child pornography.[111]

In addition to the "appears to be" clause of the CPPA, the Coalition also challenged the "conveys the impression" clause.[112] Like the "appears to be" language of the CPPA, the Court also found that the "conveys the impression" portion served no compelling government interest.[113] The majority found the government's evidence insufficient to show any harm in material merely pandered as containing child pornography.[114] Furthermore, the majority found that the "conveys the impression" language was overbroad because the statute prohibited the mere possession of materials that were pandered as child pornography.[115] In sum, the Court concluded that the challenged portions of the CPPA were overbroad and unconstitutional.[116] As such, the Court did not address the Coalition's vagueness challenge.[117]

C. Justice Thomas's Concurrence

Though Justice Thomas concurred with the majority, finding the CPPA unconstitutional, he wrote separately to assert his view that the prosecution rationale might serve a compelling government interest in the future.[118] Justice Thomas noted that the government failed to produce evidence that prosecution of real child pornographers was made impossible with the existence of virtual child pornography.[119] However, he argued that if technological advances caused such a result, the government's interest in prosecuting offenders might justify increased regulation of virtual child pornography.[120]

D. Chief Justice Rehnquist's Dissent

Chief Justice Rehnquist, joined by Justice Scalia, dissented from the majority's holding that the CPPA was unconstitutional.[121] First, Chief

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111. *See id.* at 256.

112. *Id.* This clause prohibits depictions of sexually explicit conduct that are "advertised, promoted, presented, described, or distributed in such a manner that convey the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." CPPA, 18 U.S.C. § 2256(8)(D) (1996).

113. *See Free Speech Coalition*, 535 U.S. at 256-57.

114. *Id.* at 257.

115. *Id.* at 257-58.

116. *Id.* at 258.

117. *Id.*

118. *See id.* at 259 (Thomas, J., concurring).

119. *Id.* (Thomas, J., concurring).

120. *Id.* at 259-60 (Thomas, J., concurring).

121. *See id.* at 267 (Rehnquist, C.J., dissenting) (Justice Scalia joined in the dissent except as to the paragraph outlining the legislative history, at pp. 271-72 n.2).

Justice Rehnquist deferred to the legislative findings, contending that the government had demonstrated a compelling interest in securing the ability to enforce child pornography regulations.[122] Second, Chief Justice Rehnquist objected to the majority's judgment that the CPPA was overbroad.[123] Instead, Chief Justice Rehnquist argued, the Court should interpret the definitions of the CPPA narrowly to apply only to "the sort of 'hard core of child pornography' that we found without protection in *Ferber*."[124]

In arguing to limit the CPPA's scope, the Chief Justice contended that the statute's definition of "sexually explicit conduct" should be limited to images that are "virtually indistinguishable" from pornography using real children.[125] In addition, Chief Justice Rehnquist argued to limit the CPPA's prohibition against possession or distribution of work that "conveys the impression" that it contains minors engaging in sexually explicit conduct to materials pandered as child pornography.[126] Furthermore, the Chief Justice concluded that the CPPA's "conveys the impression" language should be interpreted as limited to the "knowing" possession of materials containing depictions of real minors engaged in sexually explicit conduct or depictions that are virtually indistinguishable from real children.[127] According to the Chief Justice, this narrow interpretation of the "conveys the impression" clause would ensure that the CPPA could only apply to those who pander child pornography or knowingly possess images of real child pornography.[128] Moreover, the narrow interpretation of the CPPA in general would limit its application to only "hard core" pornography.[129]

E. Justice O'Connor's Concurrence in Part/Dissent in Part

Justice O'Connor concurred with the majority's finding that the "conveys the impression" provision of the CPPA was unconstitutional.[130] However, she opined that the "appears to be" clause should be held con-

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122. *Id.* at 270-71 (Rehnquist, C.J., dissenting).

123. *See id.* at 268 (Rehnquist, C.J., dissenting) (arguing that a finding of overbreadth should only be reserved for extreme cases where the statute in question cannot be remedied by a limiting instruction (citing *Broadrick*, 413 U.S. at 613)).

124. *Id.* at 269 (Rehnquist, C.J., dissenting).

125. *Id.* (Rehnquist, C.J., dissenting).

126. *Id.* at 271-72 (Rehnquist, C.J., dissenting).

127. *Id.* at 273 (Rehnquist, C.J., dissenting) (Chief Justice Rehnquist argued that this limitation would not limit possession of materials that contain only suggestive depictions of youthful looking actors.).

128. *See id.* at 271 (Rehnquist, C.J., dissenting).

129. *Id.* at 269-70 (Rehnquist, C.J., dissenting).

130. *Id.* at 261 (O'Connor, J., concurring in part and dissenting in part).

stitutional as applied to virtual child pornography.[131] Justice O'Connor argued that the government has a compelling interest in protecting children by regulating both actual and virtual child pornography.[132] Like Chief Justice Rehnquist, Justice O'Connor also deferred to the legislative findings that virtual child pornography whets the appetites of pedophiles and makes prosecution of child pornographers impossible.[133]

Additionally, Justice O'Connor found the CPPA to be narrowly tailored.[134] Rather than finding the CPPA unconstitutionally broad in its sweep, Justice O'Connor argued that the statute should be interpreted to apply only to those virtual images that are "virtually indistinguishable" from pornography produced using real children.[135] Reading the CPPA's "appears to be" clause closely, Justice O'Connor concluded that the statute was narrowly tailored to serve a compelling government interest and was not overbroad.[136] Thus, Justice O'Connor concurred with the majority's finding that the "conveys the impression" clause was overbroad, but concluded that the "appears to be" provision was constitutional as applied to images that are virtually indistinguishable from real child pornography.[137]

III. ANALYSIS

Taking the CPPA as a whole, the Court refused to find a sufficient connection between the possession or distribution of virtual child pornography and the crime of child abuse.[138] Given the *Free Speech Coalition* opinion, the issue of whether virtual child pornography can ever be prohibited under the same justification and with the same force as *Ferber* is questionable at best. Though the Court may not have eliminated the possibility that an affirmative defense might save the statute,[139] it seems unlikely, given the current makeup of the Court, that five justices will ever find a statute like the CPPA constitutional.[140] Thus, if the legislative findings on the ills of virtual child pornography are correct, the challenge, at least for the government, then becomes finding a constitutional means to regulate virtual child pornography.

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131. *See id.* (O'Connor, J., concurring in part and dissenting in part) (arguing that the prohibition on youthful adult pornography is unconstitutional and suggests that the provision be stricken rather than finding the CPPA as a whole overbroad).

132. *Id.* at 263 (O'Connor, J., concurring in part and dissenting in part).

133. *Id.* at 263-64 (O'Connor, J., concurring in part and dissenting in part).

134. *See id.* at 264-65 (O'Connor, J., concurring in part and dissenting in part).

135. *Id.* at 265 (O'Connor, J., concurring in part and dissenting in part).

136. *Id.* at 264-65 (O'Connor, J., concurring in part and dissenting in part).

137. *See id.* at 267 (O'Connor, J., concurring in part and dissenting in part).

138. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 250-51 (2002).

139. *Free Speech Coalition*, 535 U.S. at 255-56.

140. *But see id.* at 259-60 (Thomas, J., concurring) (implying that the prosecution problem, if proven, might be a compelling enough interest).

Within weeks of the Supreme Court's controversial decision in *Free Speech Coalition*, Congress responded with its first attempt to address the Court's ruling and began work on the Child Obscenity and Pornography Prevention Act of 2002 ("COPPA").[141] In keeping with Congress's swift action following the *Free Speech Coalition* decision, COPPA worked its way through the legislative process and the House passed the bill on June 25, 2002 by a vote of 413-8.[142] However, neither the Senate companion bill, S. 2511,[143] nor the House-passed measure[144] were taken-up by the Senate before it adjourned *sine die* on November 20, 2002 for the 2nd Session of the 107th Congress.[145] Given the rapidity of congressional action in the wake of *Free Speech Coalition*, as well as the overwhelming bipartisan support for COPPA, it is clear that the Court's ruling touched a nerve, at least in the 107th Congress.

This comment will evaluate COPPA as a proposal for constitutional regulation of virtual child pornography. After examining the constitutional obstacles inherent in COPPA following *Free Speech Coalition*, I will address the potential political obstacles to regulating virtual child pornography constitutionally, and Congress's historical unwillingness to consider the constitutionality of pending legislation. Finally, I will propose what I believe to be a constitutional solution for regulating virtual child pornography under a *Miller* statute, demonstrating that enforcement

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141. Representative Lamar Smith (R-Tex), Chair of the House Subcommittee on Crime, Terrorism, and Homeland Security, introduced the Child Obscenity and Pornography Prevention Act of 2002 ("COPPA"), H.R. 4623, 107th Cong. (2002) [hereinafter COPPA], on April 30, 2002, two weeks after the Court announced its ruling in *Free Speech Coalition*. Rep. Smith was elected to the House of Representatives in 1986. He is a graduate of Yale University and Southern Methodist University College of Law.

142. 148 CONG. REC. H3913 (daily ed. June 25, 2002).

143. Child Obscenity and Pornography Prevention Act of 2002, S. 2511, 107th Cong. (2002); *see* Thomas Legislative Service, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:SN02511:@@@L&summ2=m& (last visited Jan. 1, 2003). The Senate companion bill was introduced by Senator Jean Carnahan (D-Mo) on May 14, 2002. *See* Thomas Legislative Service, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107- :SN02511: (last visited Jan. 1, 2003).

144. *See* Thomas Legislative Service, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR04623:@@@L&summ2=m& (last visited Jan. 1, 2003).

145. 148 CONG. REC. S11,801 (daily ed. Nov. 20, 2002). However, the Senate Judiciary Committee held a hearing on child pornography on October 2, 2002, addressing legislation confronting this problem. *See Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing on S.R. 2520 Before the Senate Comm. on the Judiciary*, 107th Cong. (2002) [hereinafter *Senate Hearing*]. In addition, the Senate introduced its own child pornography legislation, the Prosecutorial Remedies and Tools Agtainst Exploitation of Children Today Act of 2002 ("PROTECT"), S. 2520, 107th Cong. (2002) [hereinafter PROTECT], sponsored by Senators Patrick Leahy (D-Vt) and Orrin Hatch (R-Utah), which passed the Senate on November 14, 2002. *See* 148 CONG. REC. S11,153 (daily ed. Nov. 14, 2002). No House action, however, was taken on the PROTECT Act. *See* Thomas Legislative Service, *Bill Summary & Status for the 107th Congress*, *at* http://thomas.loc.gov/cgibin/- bdquery/D?d107:1:./temp/~bd3pMf:@@@X|/bss/d107query.html (last visited Jan. 1, 2003).

of existing obscenity regulation will likely catch and punish at least the worst cases of even virtual child pornography.

A. *The Child Obscenity and Pornography Prevention Act of 2002*

At a May 9, 2002 hearing before the House Subcommittee on Crime, Terrorism, and Homeland Security,[146] Associate Deputy Attorney General Daniel Collins outlined the task of revising the CPPA within the confines of *Free Speech Coalition*.[147] He said, "[W]e believe that the Court's decision and the Constitution leave the Congress with ample authority to enact a new, more narrowly focused statute that will allow the government to accomplish its legitimate and compelling objectives without interfering with First Amendment freedoms."[148] In essence, the goal of this new legislation was to formulate a congressional response to the Court's decision in *Free Speech Coalition*. COPPA marked a continuation of Congress's attempt to bring virtual child pornography within the rubric of *Ferber*'s prohibition of pornography produced using real children.[149]

In COPPA, the House honed in on some of the questions left unanswered after *Free Speech Coalition*. Following the lead of Justice Thomas's concurrence,[150] Congress revised the stated purpose of the CPPA with greater particularity. Moreover, COPPA also sought to capitalize on the loopholes left after *Free Speech Coalition* by narrowing definitions and supplementing its affirmative defense.[151] Ostensibly, this legislation complied with the rules established for regulating virtual child pornography by *Free Speech Coalition*.

COPPA purportedly sought to refine and narrow the scope of the unconstitutional "appears to be" language of the CPPA in three ways.[152] Specifically, COPPA: 1) localized its stated purpose to enforcement of

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146. *Child Obscenity and Pornography Prevention Act of 2002 and the Sex Tourism Prohibition Improvement Act of 2002: Hearing on H.R. 4623 and H.R. 4477 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. on the Judiciary*, 107th Cong. (2002) (statement of Associate Deputy Attorney General Daniel P. Collins, on behalf of the Dept. of Justice) [hereinafter *House Hearing*].

147. *Id.* at 3-9 (statement of Associate Deputy Attorney General Daniel P. Collins, on behalf of the Dept. of Justice).

148. *Id.* at 6.

149. *See* COPPA, H.R. 4623, § 2 (2002); *see also Free Speech Coalition*, 535 U.S. at 249-56 (The Government argued specifically that the virtual child pornography prohibited by the CPPA should be treated the same as child pornography and thus is subject to regulation without regard to value under *Ferber* and its progeny.).

150. *See Free Speech Coalition*, 535 U.S. at 259 (Thomas, J., concurring) ("[T]echnology may evolve to the point where it becomes impossible to enforce actual child pornography laws . . . [and] in the event this occurs, the Government should not be foreclosed from enacting a regulation of virtual child pornography.").

151. *See* COPPA, H.R. 4623, § 3.

152. *See* COPPA, H.R. 4623, preamble; *House Hearing*, *supra* note 146, at 4-5.

existing child pornography law, 2) redefined the scope of what constitutes virtual child pornography, and 3) exploited the possibility that an affirmative defense might save an otherwise overbroad statute.[153] In addition, COPPA attempted to address the Court's criticisms of the "conveys the impression" language of the CPPA by devising a pandering provision that would pass constitutional muster.[154] Thus, the recurring question of whether the government can constitutionally proscribe virtual child pornography is focused on whether COPPA narrows the arena of affected speech sufficiently to permit constitutional regulation.

First, COPPA concentrated its focus by limiting its stated purpose, or government interest, to the enforcement of existing laws prohibiting actual child pornography.[155] Congress found that enforcing existing law is becoming increasing difficult because of the existence of virtual child pornography.[156] As discussed at length in Part II, the government in *Free Speech Coalition* advanced a number of theories for equating the CPPA's ban on virtual child pornography with *Ferber*. With the majority unwilling to accept these arguments, the government alternatively argued, *inter alia*, that advances in technology were making it increasingly difficult to prosecute purveyors of real child pornography due to the automatic defense that the material was virtual, and thus not produced using actual children.[157] Though not ultimately accepted by the majority, Justice Thomas's concurrence highlights the possibility that this "prosecution problem" may someday justify the prohibition of virtual child pornography.[158] Moreover, the dissenting justices in *Free Speech Coalition* also describe this narrow focus of the CPPA as a compelling government interest sufficient to permit proscription of virtual child pornography. [159]

COPPA outlined its stated focus in the Congressional Findings that accompany the new amendments.[160] In his hearing testimony, Associate Deputy Attorney General Collins claimed:

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153. *See* COPPA, H.R. 4623, § 2; *House Hearing*, *supra* note 146, at 4-5.

154. *See* COPPA, H.R. 4623, § 3; *House Hearing*, *supra* note 146, at 5. COPPA's amended pandering provisions will be outlined below. However, the attention of this Comment will be directed at analysis of COPPA's amendments to the definition of child pornography and the scope of COPPA.

155. *See* COPPA, H.R. 4623, § 2; *House Hearing*, *supra* note 146, at 4.

156. *See* COPPA, H.R. 4623, § 2.

157. *Free Speech Coalition*, 535 U.S. at 254.

158. *Id.* at 259 (Thomas, J., concurring).

159. *Id.* at 267 (Rehnquist, C.J., dissenting) ("Congress has a compelling interest in ensuring the ability to enforce prohibitions of actual child pornography.").

160. *See* COPPA, H.R. 4623, § 2. Congress found the following:

> (1) Obscenity and child pornography are not entitled to protection under the First Amendment under *Miller v. California*, 413 U.S. 15 (1973) (obscenity), or *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography) and thus may be prohibited.;

(2) The Government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. 'The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,' *New York v. Ferber*, 458 U.S. 747, 757 (1982) (emphasis added), and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. *Osborne v. Ohio*, 495 U.S. 103, 110 (1990).;
(3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. '[T]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.' *Ferber*, 458 U.S. at 760.;
(4) In 1982, when the Supreme Court decided *Ferber*, the technology did not exist to: (A) create depictions of virtual children that are indistinguishable from depictions of real children; (B) create depictions of virtual children using compositions of real children to create an unidentifiable child; or (C) disguise pictures of real children being abused by making the image look computer generated.;
(5) Evidence submitted to the Congress, including from the National Center for Missing and Exploited Children, demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer generated. The technology will soon exist, if it does not already, to make depictions of virtual children look real.;
(6) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and/or related media.;
(7) There is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children. Nevertheless, technological advances since *Ferber* have led many criminal defendants to suggest that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated. Such challenges will likely increase after the *Ashcroft v. Free Speech Coalition* decision.;
(8) Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker. An image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic delineation may depend on the quality of the image scanned and the tools used to scan it.;
(9) The impact on the government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in *Free Speech Coalition*. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court's affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as declined potentially meritorious prosecutions.;
(10) In the absence of congressional action, this problem will continue to grow increasingly worse. The mere prospect that the technology exists to create computer or computer-generated depictions that are indistinguishable from depictions of real

> Already, defendants contend that there is reasonable doubt as to whether a given computer image—and most prosecutions involve materials stored and exchanged on computers—was produced with an actual child or as a result of some other process. There are experts who are willing to testify to the same effect on defendants' behalf. Moreover, as computer technology continues its rapid evolution, this problem will only grow increasingly worse. Trials will increasingly devolve into jury-confusing battles of experts arguing over the method of generating an image that, to all appearances, looks like it is the real thing.[161]

In recognition of this dilemma, Collins contended that COPPA effectively narrowed its scope to only the compelling government interest of ensuring that purveyors of real child pornography could be successfully prosecuted.[162] According to Collins, the government could achieve this circumscribed goal by prohibiting virtual child pornography that is virtually indistinguishable from pornography produced using real children.[163]

To address this more limited government interest, COPPA restricted the definition of "child pornography" that the Supreme Court found constitutionally suspect in *Free Speech Coalition*.[164] In addition, COPPA attempted to remedy the affirmative defense attacked by the *Free Speech Coalition* majority.[165] According to proponents of the bill, the compression of the definitions of what constitutes child pornography, coupled

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> children will allow defendants who possess images of real children to escape prosecution, for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable.;
>
> (11) To avoid this grave threat to the Government's unquestioned compelling interest in effective enforcement of the child pornography laws that protect real children, a statute must be adopted that prohibits a narrowly-defined subcategory of images.;
>
> (12) The Supreme Court's 1982 *Ferber v. New York* decision holding that child pornography was not protected drove child pornography off the shelves of adult bookstores. Congressional action is necessary to ensure that open and notorious trafficking in such materials does not reappear.

Id.

161. *House Hearing*, *supra* note 146, at 4.

162. *See id.*

163. *Id.*

164. The CPPA provided definitions for what constitutes "child pornography." CPPA, 18 U.S.C. § 2256(8). *See Free Speech Coalition*, 535 U.S. at 256, where the majority found the challenged "appears to be" provision of the CPPA constitutionally overbroad. COPPA attempts to remedy the constitutional problems of the CPPA, in part, by narrowing the definition of what is child pornography from any image that "appears to be" of minor engaging in sexually explicit activity to "a computer image or computer-generated image that is, or is indistinguishable from that of a minor engaging in sexually explicit conduct." COPPA, H.R. 4623, § 3(a).

165. The *Free Speech Coalition* majority attacked the CPPA's affirmative defense as "incomplete and insufficient" primarily because the affirmative defense failed to provide a defense for possession. *Free Speech Coalition*, 535 U.S. at 256; *see also House Hearing*, *supra* note 146, at 5; COPPA, H.R. 4623, § 3 (COPPA specifically addressed the Court's concern by including a possession defense).

with the augmented affirmative defense, would address the government's interest in enforcing existing law while passing constitutional muster.[166]

Associate Deputy Attorney General Collins testified that COPPA refocused on enforcing *Ferber*'s prohibition of real child pornography in five ways.[167] The first of COPPA's amendments was a revision of the definition of child pornography to include only computer images or computer-generated images.[168] Proponents of the bill claimed that this narrowed focus addressed the major medium for transmitting child pornography.[169] According to COPPA's Congressional Findings and Collins's testimony, most child pornography is trafficked over the Internet and/or is found on computers.[170] Thus, by defining child pornography to include virtual images on the computer, Collins argued, COPPA would cover most of the material at the "core of the Government's practical concern."[171] Moreover, COPPA's circumscribed application to cover only computer images implicated a suppression "not . . . of any idea but rather to uses of particular instruments in a way that directly implicate[d] the Government's compelling interest in keeping the child pornography laws enforceable."[172]

Second, COPPA refined the definition of child pornography further by substituting the unconstitutional "appears to be" language of the CPPA with "virtually indistinguishable from that of a minor engaged in sexually explicit conduct."[173] Collins argued that by limiting the application only to images that "to an ordinary observer . . . could pass for the real thing," ensured that the government could successfully prosecute purveyors of real child pornography.[174]

COPPA further limited the scope of regulation for virtual child pornography by restricting prosecution of virtual child pornography to only those images depicting "lascivious" simulated intercourse.[175] Thus, according to Associate Deputy Attorney General Collins, COPPA would not place limitations on movies such as *Traffic*, since "'simulated' sexual intercourse would be covered only if . . . the depiction is 'lascivious' and involves the exhibition of the 'genitals, breast, or pubic area' of any per-

166. *See House Hearing*, *supra* note 146, at 10-11.
167. *Id.* at 4-5.
168. *Id.* at 4.
169. *Id.*
170. COPPA, H.R. 4623, § 2 ¶ 6; *House Hearing*, *supra* note 146, at 4.
171. *House Hearing*, *supra* note 146, at 4.
172. *Id.*
173. COPPA, H.R. 4623, § 3(a)(B); *see also Free Speech Coalition*, 535 U.S. at 265, 268 (dissenters argued that the CPPA should be narrowly construed to apply to only images that are "virtually indistinguishable" from a minor engaging in sexually explicit conduct).
174. *House Hearing*, *supra* note 146, at 5.
175. COPPA, H.R. 4623, § 3(b)(i).

son."[176] From the testimony, it seems evident that the intent of this provision was to respond to the *Free Speech Coalition*'s concern for movies and other artistic performances or representations that were prohibited under the CPPA.[177]

In conjunction with narrowing the focus of the government interests and the definitions of what constituted child pornography, COPPA also attempted to refine the affirmative defense in an effort to limit the reach of the bill.[178] As discussed above, both the majority opinion and Justice Thomas's concurring opinion expressly left open the possibility that an appropriate affirmative defense might aid the constitutionality of the CPPA.[179] Taking into account this opening, COPPA specifically addressed the stated insufficiencies of the CPPA's affirmative defense by including a defense for possession or production of child pornography requiring a showing that real children were not used in the production thereof.[180]

The *Free Speech Coalition* majority found the CPPA's affirmative defense insufficient to "save" the statute from being overbroad.[181] The majority criticized the CPPA's affirmative defense on two grounds.[182] First, the Court determined that the affirmative defense failed to provide a defense for possession.[183] "While the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing prohibited work."[184] Second, the *Free Speech Coalition* majority found fault with the CPPA's failure to provide an affirmative defense to producers of images created not using real children.[185] COPPA specifically attempted to remedy these criticisms by including a defense that the images were not created using actual children.[186] Thus, under COPPA, a defendant charged with either possession

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176. *House Hearing*, *supra* note 146, at 8 (quoting COPPA, H.R. 4623, § 3(b)(i)).

177. *Id.* ("Notably, this change alone [the definition of sexually explicit conduct for simulated intercourse] eliminates most of the overbreadth identified by the Court; it was the breadth of the definition of sexually explicit conduct that led to distracting and unhelpful arguments over whether movies such as 'Traffic' and 'American Beauty' were covered.").

178. COPPA, H.R. 4623, § 3; *House Hearing*, *supra* note 146, at 5; *see also Free Speech Coalition*, 535 U.S. at 256 (finding the CPPA's affirmative defense to be "incomplete and insufficient").

179. *Free Speech Coalition*, 535 U.S. at 256, 259-60.

180. COPPA, H.R. 4623, § 3(c).

181. *Free Speech Coalition*, 535 U.S. at 256.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *See* COPPA, H.R. 4623, § 3(c) (amending the unconstitutional provision of the CPPA, 18 U.S.C. § 2252A(c), as follows: "[I]t shall be an affirmative defense to a charge of violating this section that the alleged offense did not involve the use of a minor."); *see also House Hearing*, *supra* note 146, at 5.

or distribution of child pornography could assert an affirmative defense if he could prove that no children were used in the production of the image.[187]

COPPA also attempted to refine the provisions concerning pandering of virtual child pornography by prohibiting any offer to purchase or sell real child pornography without requiring proof that such material actually exists.[188] The challenged provision of the CPPA criminalized sexually explicit depictions that were "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaged in sexually explicit conduct."[189] According to Associate Deputy Attorney General Collins, the Court criticized this provision because the "prior law criminalized materials based on how they were marketed."[190] In contrast, proponents of COPPA's new pandering provision suggested that the bill moved the focus from how sexually explicit material is marketed to the fact that sexually explicit material is marketed at all.[191] According to proponents of COPPA, this modification effectively responded to the Court's sharp criticism of criminalizing as pandering any offer to buy or sell child pornography.[192]

B. COPPA's Constitutional Problems

Proponents of COPPA contended that the bill effectively narrowed its focus and refineed the definitions and affirmative defense to accomplish the limited interest of enforcing the constitutional ban on child pornography produced using real children. If new legislation in the 108th Congress successfully works its way through the legislative process and becomes law, its constitutionality may again be challenged. While COPPA arguably narrowed the unconstitutional provisions of the CPPA, some clear problems still existed, and the constitutionality of new COPPA-like legislation is tenuous.[193] In fact, in a hearing before the Senate Judiciary Committee on the subject of child pornography, two witnesses, both law professors, claimed that COPPA, as drafted, was

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187. COPPA, H.R. 4623, § 3; *House Hearing*, *supra* note 146, at 5.

188. COPPA, H.R. 4623, § 4.

189. *Free Speech Coalition*, 535 U.S. at 257 (quoting CPPA, 18 U.S.C. § 2256(8)(D)).

190. *House Hearing*, *supra* note 146, at 5, 8 (statement of Associate Deputy Attorney General Daniel P. Collins, on behalf of the Dept. of Justice).

191. *Id.* at 8.

192. *Id.*

193. Kurt Indvik, *VSDA Says New Child Pornography Bill Will Likely Not Pass Judicial Muster*, VIDEO STORE, July 14, 2002, at 13, *available at* 2002 WL 24537763 (According to Sean Bersell, Vice President of public affairs for the Video Software Dealers Association, "We have looked at the house bill and we think that it would still fail the Supreme Court test under the *Free Speech Coalition* case.").

unconstitutional.[194] Indeed, even Representative Adam Schiff,[195] a member of the House Subcommittee on Crime, Terrorism, and Homeland Security, expressed his view that COPPA might fail constitutional muster.[196]

First, at least six justices have already rejected the government's argument for the "prosecution rationale," which is at the heart of COPPA's reworked provisions.[197] In *Free Speech Coalition*, the government expressly argued that the CPPA's provisions were necessary to prevent purveyors of real child pornography from claiming an automatic defense that the images were virtual and did not use real children.[198] The majority rejected this argument, stating: "The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down."[199] Moreover, even though Justice Thomas, in his concurring opinion, expressed his view that this prosecution rationale may one day prove sufficient to justify limits on virtual child pornography, he noted that "the Government asserts only that defendants *raise* such defenses, not that they have done so successfully . . . this speculative interest cannot support the broad reach of the CPPA."[200] Thus, unless the government can point to defendants who have been acquitted under a "virtual" defense, it is unclear whether the Court will be willing to acknowledge any proscription of virtual child pornography, under COPPA or similar legislation.[201]

Though COPPA may have narrowed its asserted purpose to enforcing child pornography laws, little changed in the interim between *Free Speech Coalition* and this proposed legislation.[202] In short, the govern-

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194. *Senate Hearing*, *supra* note 145 (statements of Frederick Schauer, Professor of the First Amendment at Kennedy School of Government, Harvard University, and Ann Couglin, Class of 1948 Research Professor of Law at the University of Virginia Law School. They both testified that COPPA was unconstitutional.).

195. Representative Schiff (CA-D) was elected to the United States House of Representatives in 2000 following a four-year term as a state senator in California. Prior to holding elected office, Mr. Schiff served in the United States Attorney's Office in Los Angeles, California. Representative Schiff is a graduate of Stanford University and Harvard Law School.

196. *House Hearing*, *supra* note 146, at 15-16 (Statement of Rep. Adam Schiff) ("I think that the problem of child pornography is such a serious one that the Supreme Court decision really has to be addressed legislatively . . . . I think that this bill does do that. It's still, I think, going to be a very close constitutional question, but I think it's one that we have to raise, if we're going to effectively combat this problem.").

197. *See Free Speech Coalition*, 535 U.S. at 254-55.

198. *Id.*

199. *Id.*

200. *Id.* at 259-60 (Thomas, J., concurring).

201. *See id.*

202. In fact, Congressional Findings supporting COPPA indicate that the technology to create computer images virtually indistinguishable from real child pornography does not exist. COPPA, H.R. 4623, § 2. For example, paragraph five states that "[t]he technology will soon exist, if it does not already, to make depictions of virtual children look real," and paragraph seven states that

ment has already tried to assert the prosecution rationale as a compelling government interest, and it has failed.[203]

However, even if the Court eventually accepts the prosecution problem as a justification for regulation of virtual child pornography, COPPA still proscribed a substantial amount of protected speech; the question is whether it was too much?[204] Even though COPPA, at least on its face, narrowed the scope of speech regulable as child pornography, instances remain where potentially nonobscene virtual images of children are still within the ambit of COPPA. Moreover, many of the purportedly narrowed provisions of COPPA amount to little more than just a restatement of the same definitions already found unconstitutional in *Free Speech Coalition*.[205]

For example, COPPA allegedly restricted its reach by applying to only computer images or computer-generated images.[206] In *Free Speech Coalition*, a majority of the Court specifically found that the First Amendment protects such images.[207] Associate Deputy Attorney General Collins argued that COPPA "extends not to the suppression of any idea but rather to uses of particular instruments, such as computers, in a way that directly implicates the Government's compelling interest in keeping the child pornography laws enforceable."[208] However, there is no practical difference between the two since, according to COPPA's Congressional Findings, most virtual child pornography is produced and transmitted using computer technology.[209]

Moreover, videos, photographs, and other images fall within COPPA's definition of child pornography so long as they are found on a computer.[210] Thus, even a protected image might be subject to COPPA if

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"[t]here is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children." *Id.* at ¶¶5, 7.

203. *See Free Speech Coalition*, 535 U.S. at 254-55.

204. *See* Indvik, *supra* note 193.

205. *Senate Hearing*, *supra* note 145 (statement of Ann Couglin) ("Indeed, it is difficult to understand how the House bill could be interpreted as an effort to correct the defects in the CPPA that were identified in Free Speech Coalition. Instead, the House bill seems to embody a decision merely to reenact the CPPA all over again.").

206. COPPA, H.R. 4623, § 3.

207. *See Senate Hearing*, *supra* note 145 (statement of Ann Coughlin). Professor Coughlin notes of the *Free Speech Coalition* decision, "In particular the Court concluded that the prohibitions covered materials: (1) that were not regulable under *Ferber* because they were not the product of child abuse . . . and (2) that were protected by *Miller* because they were of serious literary, artistic, scientific, or other value." *Id.*

208. *House Hearing*, *supra* note 146, at 4 (statement of Daniel P. Collins).

209. *See* COPPA, H.R. 4623, § 2.

210. *See House Hearing*, *supra* note 146, at 22-23 (Deputy Attorney General Collins, in response to Congressman Schiff's questions, acknowledged that the COPPA covers videos and photographs, or any image found on a computer.).

it was found on a computer or created using computer technology.[211] For example, with the increased accessibility, economic benefits, and abundance of the Internet, many movies already advertise trailers online. As technology advances, it is not beyond imagination that movies and other legitimate, and non-obscene, media may be available over the Internet. Given the scope of COPPA's definition of child pornography, many of the same concerns raised by the majority about the proscription of movies like *Traffic* and *American Beauty* might be proscribed under COPPA.[212]

In addition, by extending to all computer-generated images, COPPA might reach documentaries on child sexual abuse, which use computer graphics to avoid using real children, or even movies like *Titanic* or *A.I.*, which have already used computer technology to supplement and even replace real actors.[213]

Proponents of COPPA also argued that the scope of the bill was further limited by confining the definition of child pornography to any computer image that is *indistinguishable* from that of a minor engaging in sexually explicit conduct.[214] However, this very suggestion of restricting the CPPA to material indistinguishable from real child pornography was proffered by the dissenting justices in *Free Speech Coalition*[215] and was rejected by the Court.[216] Professor Schauer, in his testimony before the Senate Judiciary Committee, criticized the addition of the "indistinguishable" definition:

> Even if no person at all could tell the difference between materials using real children and materials using computer-generated images, the absence of real children in the latter case is exactly why the Supreme Court in *Free Speech Coalition* refused to find *Ferber* applicable, and no degree of indistinguishability in [t]he image can create a real child where none existed before.[217]

Thus, it is at least questionable whether COPPA meaningfully solved any of the constitutional flaws of the CPPA.[218] COPPA's acceptance of language that was expressly rejected by the majority, and failure to provide "any explanation for why this definition would be greeted by the Court as an improvement over the definition it just rejected,"[219] makes clear the

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211. *Id.*

212. *Free Speech Coalition*, 535 U.S. at 247-48.

213. *See* Anderson, *supra* note 13, at 393.

214. *House Hearing*, *supra* note 146, at 4 (statement of Daniel P. Collins).

215. *Free Speech Coalition*, 535 U.S. at 264-65 (O'Connor, J., concurring in part and dissenting in part), 268-73 (Rehnquist, J., dissenting).

216. *See id.* at 249-51 (dismissing the government's "virtually indistinguishable" construction argument).

217. *Senate Hearing*, *supra* note 145 (statement of Frederick Schauer).

218. *See id.*

219. *Id.* (statement of Ann Coughlin).

difficulty in regulating virtual child pornography after *Free Speech Coalition*. However, it is also clear that this new definition is highly susceptible to the same kind of overbreadth challenge that plagued its predecessor, the CPPA.[220]

In response to the potential overbreadth problems, COPPA also attempted to accommodate *Free Speech Coalition* by revising the affirmative defense found insufficient by the Supreme Court.[221] Associate Deputy Attorney General Collins suggested of the changes, "The affirmative defense is explicitly amended to include possession offenses . . . [and] is also amended so that a defendant could prevail simply by showing that no children were used in the production of the materials. Prior law only granted an affirmative defense for productions involving youthful-looking adults."[222] According to proponents of the bill, the narrowed definitions of child pornography, in tandem with the supplemented affirmative defense, ensured that COPPA's prohibition of virtual child pornography was not overbroad.[223]

According to the Vice President of Public Affairs for the Video Software Dealers Association, however, COPPA's affirmative defense amounted to little more than a burden-shifting device requiring the accused to prove his innocence by demonstrating that the images were not produced using real children.[224] Moreover, although the majority in *Free Speech Coalition* refused to specifically address the question of whether the affirmative defense could "save the statute,"[225] the Court suggested that there exists "serious constitutional difficulties [raised] by seeking to impose on the defendant the burden of proving his speech is not unlawful."[226] The Court also noted the difficulty of requiring a defendant to prove his innocence after prosecution has begun. Justice Kennedy wrote of the evidentiary dilemma, "Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, . . . it will be at least as difficult for the innocent possessor."[227] Thus, even if COPPA's affirmative defense helped to suffi-

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220. *Id.* (statements of Frederick Schauer and Ann Coughlin).

221. COPPA, H.R. 4623, § 3. The COPPA also restricts its scope for sexually explicit images by requiring that simulated sexual intercourse be "lascivious" to violate the bill. *Id.* § 3(b)(B)(i). However, based on the hearing testimony, this restriction appears to be primarily intended to cover movies and other artistic performances, not virtual pornography. *See House Hearing*, *supra* note 146, at 8.

222. *House Hearing*, *supra* note 146, at 5 (statement of Daniel P. Collins).

223. *Id.*

224. Indvik, *supra* note 193; *see also Senate Hearing*, *supra* note 194 (statements of Frederick Schauer and Ann Coughlin).

225. *Free Speech Coalition*, 535 U.S. at 256.

226. *Id.* at 255.

227. *Id.* at 255-56.

ciently narrow its reach, it is unclear that an affirmative defense can be employed in the area of virtual child pornography to make an otherwise suspect statute constitutional.[228]

In addition, Professor Coughlin also asserted that COPPA's affirmative defense failed in substance.[229] Professor Coughlin argued that COPPA's affirmative defense was too broad and might create a loophole for some defendants to escape criminal liability even for obscene material.[230] She suggested, "[T]he House bill proposes to put in place an affirmative defense that could be read to authorize child pornographers who produce and peddle materials that possess no redeeming social value to escape prosecution on the ground that the materials were made without using an actual minor."[231] Consequently, even if the constitutionality of COPPA's affirmative defense was not at issue, the substance and one potential loophole might compromise the validity of the statute.[232]

Finally, COPPA's amended provision on pandering[233] purported to remedy the problems pointed out by the Court in *Free Speech Coalition* by focusing on the act of marketing instead of on the character of the material.[234] However, Congress's task in constitutionally regulating virtual child pornography may not be as simple as suggested by Associate Deputy Attorney General Collins.[235] Again, attempts to regulate virtual child pornography without regard to obscenity requirements could prove fruitless.[236] Professor Schauer contends:

> [COPPA] treats pandering as an independent offense without the necessity of a showing that the material pandered is in fact legally obscene or is in fact child pornography made with the use of a real child. In the absence of such a showing, the "advertising for an unlawful transaction" rationale disappears, and the pandering provision appears instead as a prohibition on the advertising of an immoral or unhealthy but lawful product, plainly protected by the First Amendment under recent court rulings.[237]

Once again, COPPA might be constitutionally suspect because of Congress's repeated attempts to try to regulate virtual child pornography with the same force of *Ferber*. After analysis, the best that can be said of

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228. *See Senate Hearing*, *supra* note 145 (statement of Frederick Schauer) (asserting the Court's skepticism to use affirmative defenses in the area of child pornography).

229. *Id.* (statement of Ann Coughlin).

230. *Id.*

231. *Id.*

232. *See id.*

233. COPPA, H.R. 4623, § 4.

234. *House Hearing*, *supra* note 146, at 5 (statement of Daniel P. Collins).

235. *See Senate Hearing*, *supra* note 145 (statement of Frederick Schauer).

236. *See id.*

237. *Id.*

COPPA is that it may still be unconstitutional.[238] Even proponents of legislation attempting to regulate virtual child pornography in the aftermath of *Free Speech Coalition* acknowledged the potential failings of COPPA.[239]

Even if COPPA or a similar bill were passed into law in the 108th Congress, the constitutionality of regulating virtual child pornography is unclear at best. Some commentators have argued that Congress is grandstanding or attempting to force defenders of the First Amendment to utilize limited resources in order to keep challenging the constitutionality of statutes implicating First Amendment restrictions.[240] Wendy Kaminer, for example, said of Congress's response to *Free Speech Coalition* and COPPA, "Maybe Congress and the White House doesn't [sic] care whether laws like these are constitutional . . . . Maybe they care mainly about getting credit for their passage (while draining resources of free-speech organizations by forcing them to challenge unconstitutional laws)."[241] This comment will not predict the future, but instead pose the questions that are likely to be litigated in the lower courts. And indeed, if passed, COPPA might suffer the fate of other statutes passed in response to Supreme Court decisions by floundering in the lower courts.[242] Though the future of any COPPA-like statute is unclear, if history is any indication, the constitutionality of such a bill will likely be challenged. This is clearly an undesirable result.[243] According to Professor Schauer, "As the six-year course of litigation under the previous Act so well demonstrates, constitutionally suspect legislation under existing Supreme Court interpretations of the First Amendment . . . puts the process of prosecuting the creators of child pornography on hold while the appellate courts proceed at their own slow pace."[244] While there may be room in the Constitution for symbolic legislation, "for Congress to enact symbolic but likely unconstitutional legislation would have the principal ef-

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238. *Id.* (statements of Frederick Schauer and Ann Coughlin asserting that COPPA was likely unconstitutional and the provisions amounted to little more than a second attempt at the same provisions of the CPPA that the Court found unconstitutional in *Free Speech Coaltion*).

239. *House Hearing*, *supra* note 146, at 15-16 (statement of Rep. Adam Schiff).

240. Wendy Kaminer, *Porn Again*, AM. PROSPECT, July 1, 2002, at 9, *available at* 2002 WL 7761513; *see* Mark Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J. L. & PUB. POL'Y 977, 999, 1030 (2002) (arguing that, in the realm of Internet pornography, Congress enacts unconstitutional laws in order to meet public concerns after laws are found by the Supreme Court to be unconstitutional).

241. Kaminer, *supra* note 240.

242. *See id.* (discussing the enactment of the Child Online Protection Act of 1997 passed in response to the Supreme Court finding the Communications Decency Act unconstitutional. After a federal appeals court struck down the Child Online Protection Act, the Supreme Court denied certiorari and sent the case back to the lower courts while continuing to enjoin enforcement of the Act).

243. *See Senate Hearing*, *supra* note 145 (statement of Frederick Schauer).

244. *Id.*

fect of postponing for conceivably six more years the ability to prosecute those creators of child pornography whose prosecution is consistent with the Supreme Court's view of the First Amendment."[245]

C. *The Easy Answer:* Miller

Though the constitutionality of a COPPA-like statute is debatable, the controversy will likely end in the Supreme Court. Given the clear reluctance of the Court to uphold the constitutionality of the CPPA's ban on virtual child pornography, the best and most effective option may be to enforce existing law and prosecute virtual child pornography as obscenity.[246] While the *Miller* obscenity standard is certainly more malleable and less severe than *Ferber*'s outright ban on child pornography, much of the worst or hardest types of even virtual pornography will likely meet the standards of obscenity. Though obscenity may not be the most effective method for stamping out child pornography, it is one of the few sure formulas for regulation left standing after *Free Speech Coalition.*

As discussed above, the government may regulate obscenity under a *Miller* statute if the material, taken as a whole: 1) appeals to the prurient interest; 2) is patently offensive; 3) in light of community standards; and 4) lacks scientific, literary, artistic, or political value.[247] In the realm of child pornography, virtual or otherwise, any material, whether on a computer or elsewhere, that appeals to the prurient interest in a way that offends community standards and lacks social value can be regulated under existing and well-recognized obscenity laws.[248] Thus, under a *Miller* statute, Congress may constitutionally prohibit the distribution of virtual child pornography as obscenity.

While burdens of prosecuting pornographers are certainly eased under *Ferber* and its progeny,[249] a *Miller* obscenity statute will still reach a great deal of virtual child pornography because most child pornography fits within the definition of obscenity.[250] Moreover, a Renaissance painting or movie like *Traffic*, both of which the *Free Speech Coalition* Court worried might be banned under the CPPA,[251] would not foster criminal liability. Given the Court's reluctance to accept the government's arguments in defense of the CPPA, addressing the problems of virtual child

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245. *Id.*

246. Treglia, *supra* note 8 (arguing that state obscenity laws are still in force after *Free Speech Coalition*).

247. *Free Speech Coalition*, 535 U.S. at 246 (citing Miller v. California, 413 U.S. 15, 24 (1973)).

248. *See* Treglia, *supra* note 8.

249. *See Senate Hearing*, *supra* note 145 (statement of Frederick Schauer).

250. *See id.*

251. *See Free Speech Coalition*, 535 U.S. at 241.

pornography as obscenity and aggressively prosecuting offenders may be the government's most viable means of regulating virtual child pornography.

In addition to COPPA's constitutionally questionable amendments for regulating child pornography, section five of the bill also proposed additional and more stringent penalties for obscene materials depicting pre-pubescent children.[252] Even the *Free Speech Coalition* Court acknowledged that the age of the persons engaged in sexually explicit conduct might be relevant in determining whether material is obscene.[253] Thus, more stringent penalties may be one way to combat virtual pornography within the constitutional rubric of *Miller*.

The applicability and constitutional attractiveness of using a *Miller* statute to regulate virtual child pornography is evident.[254] The *Miller* test requires satisfaction of four prongs.[255] Under *Miller*'s first prong, material may be obscene if it appeals to the prurient interest.[256] This prong is to be adjudged by the trier of fact based upon whether the average person would find the work to appeal to the prurient interest.[257] If adult pornography can meet this first prong, certainly child pornography, whether virtual or not, will likely be found by the average member of any community to appeal to the prurient interest in sex.

Miller's second prong requires that, for a work to be regulated as obscenity, the material must depict sexual conduct in a patently offensive way specifically defined by law.[258] The *Miller* Court suggested that "patently offensive" might be defined as "representations . . . of ultimate sexual acts, normal or perverted" or "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[259] In the context of virtual child pornography, COPPA's definitions of "sexually explicit conduct" likely comply with the patent offense requirement. Moreover, similar descriptions were included in the proposed Senate bill, PROTECT. In addition, Professor Schauer testified that "there has never been any indication that the activities specified are not within the range that a legislature may constitutionally find to be patently

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252. COPPA, H.R. 4623, § 5. The constitutionality of these provisions is beyond the scope of this Comment. The significance lies in Congress's ability to set more stringent penalties for obscenity involving children.

253. *Free Speech Coalition*, 535 U.S. at 240.

254. Treglia, *supra* note 8; *see Senate Hearing*, *supra* note 145 (statement of Frederick Schauer) (arguing that the Senate bill, PROTECT, is constitutional because it requires that material be obscene in its definition of covered child pornography).

255. *Miller*, 413 U.S. at 24.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 25.

offensive."[260] In conjunction with this second prong, *Miller* also requires that regulable obscenity be patently offensive in light of community standards.[261] As is discussed further below, regulation of virtual child pornography under *Miller* is unlikely to be hampered significantly due to a "community standards" requirement.

Finally, *Miller* protects certain materials by defining as obscene only those which, taken as a whole, lack serious literary, artistic, scientific, or political value.[262] This requirement leaves open an exemption for a Renaissance painting, movies, and pictures in scientific texts.[263] Congress could easily rewrite a constitutional virtual child pornography statute by providing exemptions for materials with serious social value.[264] Since virtual child pornography does not exploit actual children in the production process, protecting works with social value does not risk further harm to children, the basis for *Ferber*'s ban on real child pornography.[265] Moreover, even the *Ferber* Court acknowledged that there might be instances where depictions of children engaged in sexually explicit conduct have some social value.[266] However, to protect both children and the First Amendment simultaneously, the *Ferber* Court suggested specifically that youthful looking adults be used in place of children if real scientific or artistic value would be lost without the inclusion of the sexually explicit conduct.[267] In short, Congress could constitutionally regulate virtual child pornography so long as the statute reached only images without serious scientific, artistic, literary, or political value.

Though virtual child pornography is regulable under a *Miller* obscenity statute, some commentators have argued against applying the *Miller* test to the context of child pornography.[268] For example, in *Ferber*, the community standards requirement was found inappropriate when balanced against judging the primary harm to a real child in the produc-

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260. *Senate Hearing*, *supra* note 145 (statement of Frederick Schauer). Although Professor Schauer's testimony focused on the proposed Senate bill, PROTECT, with the exception of the proposed Senate bill's inclusion of an obscenity requirement, the descriptions of sexually explicit material are the same for both PROTECT and COPPA.

261. *Miller*, 413 U.S. at 24.

262. *Id.* at 24-25.

263. *See Free Speech Coalition*, 535 U.S. at 240-41.

264. Meeting the criteria for *Miller*'s third prong could be accomplished simply by adding a provision to the statute that required the prosecutor to prove that the work in question lacked serious literary, artistic, scientific or political value. *See id.* at 246-47 (asserting that the CPPA lacked any accommodation for works with social value as defined by *Miller*).

265. *See* New York v. Ferber, 458 U.S. 747, 761 (1982).

266. *See Ferber*, 458 U.S. at 762-63.

267. *See id.* at 763.

268. *See* Anderson, *supra* note 13; Matthew K. Wegner, Note, *Teaching Old Dogs New Tricks: Why Traditional Free Speech Doctrine Supports Anti-Child-Pornography Regulations in Virtual Reality*, 85 MINN. L. REV. 2081, 2110 (2001) (citing Dennis W. Chiu, *Obscenity on the Internet: Local Community Standards for Obscenity Are Unworkable on the Information Superhighway*, 36 SANTA CLARA L. REV. 185, 188-89 (1995)).

tion of child pornography.[269] Avoiding the possibility that real child pornography might be judged obscene in one community while not in another was one of the justifications the *Ferber* Court gave for moving beyond the traditional obscenity test.[270] In short, the *Ferber* Court recognized the primary harm to a child in the context of real child pornography and concluded that the government could constitutionally protect children from this harm in every state without examining local standards of decency.

However, in *Free Speech Coalition*, a majority of the Court found no direct link between virtual child pornography and pedophilia.[271] Thus, after *Free Speech Coalition*, it will be hard to argue secondary harm to children in virtual child pornography cases since the Court has already addressed and rejected this argument.[272] Given the limitations on regulating virtual child pornography after *Free Speech Coalition*, as well as the decreased fear that differing community standards might lead to variances in the primary harm to children, *Miller* continues to be the light at the end of the tunnel for regulating at least some virtual child pornography. While some virtual pornography may fall through the cracks of the obscenity test, most communities from Bangor, Maine, to Los Angeles, California, will find virtual depictions of children engaging in sexually explicit conduct to be offensive.

Though the government may regulate the distribution of a substantial amount of virtual child pornography as obscenity,[273] under *Stanley v. Georgia*[274] possession of obscenity in the home cannot be constitutionally prohibited.[275] This is likely one reason Congress drafted COPPA (and the CPPA) without regard to the *Miller* requirements. For proponents of the strict regulation of virtual child pornography, the inability to regulate possession of explicit but virtual images of children presents a clear problem to which there is no easy answer. Even with advances in technology, it is easier for the government to monitor materials posted on a Web site than to track and locate the individuals who choose to access the Web site to view or download pornography. In addition, those distributing virtual child pornography from shops and storefronts are more easily located than those who possess movies or magazines in their homes. Certainly, this logistical practicality argument is of little comfort to those who aim to stamp out the market for child pornography. How-

269. *Ferber*, 458 U.S. at 761.
270. *Id.*
271. *Free Speech Coalition*, 535 U.S. at 250.
272. *Id.*
273. *See Miller*, 413 U.S. at 15.
274. *See* Stanley v. Georgia, 394 U.S. 557 (1969).
275. *Stanley*, 394 U.S. at 566.

ever, finding and punishing the purveyors of child pornography may be the most effective way to target the industry.

Additionally, some have argued that *Miller*'s community standards prong is problematic when applied to regulating the distribution of virtual child pornography over the Internet.[276] Matthew K. Wegner, in arguing for the creation of a new category for virtual child pornography and a national obscenity standard, suggests that the *Miller* standard's focus on local community standards is outmoded as community standards have become increasingly global.[277] Wegner further argues that regulation of obscenity over the Internet presents a notice problem as materials pass jurisdictional boundaries over the Internet into communities that may have more or less strict standards than the location from which the material originated.[278] However, if the argument supporting the globalization of community standards is true, then it is unlikely that obscenity will be judged differently in distinct jurisdictions. That is, if global standards exist, material found obscene in one jurisdiction will likely be obscene in another. In short, with the globalization of community standards the problem of notice becomes increasingly obsolete.[279]

The *Miller* approach, though not perfect in the context of virtual child pornography, provides a proven method of regulating the type of material at the heart of the CPPA and COPPA. The *Ferber* prohibition on child pornography provides stronger medicine for battling the child pornography industry.[280] However, even under *Ferber*, written material about child pornography cannot be constitutionally regulated.[281] Thus, even the *Ferber* Court recognized the need to limit the application of its decision to pornography involving and harming a real child.[282] The *Free Speech Coalition* majority was unwilling to equate the primary harm to children inherent in the *Ferber* rationale with the secondary effects of virtual child pornography argued by the government.[283] Without more convincing evidence of the primary harm to children, for now, at least, it seems that virtual child pornography has more similarities to written ma-

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276. Wegner, *supra* note 268, at 2110 (citing Chiu, *supra* note 268, at 188-89).

277. *Id.* at 2110 (citing Chiu, *supra* note 268, at 215).

278. *Id.* (citing Chiu, *supra* note 268, at 188). Wegner further argues that the Supreme Court should adopt a national obscenity standard. However, this argument has not been accepted by the Supreme Court.

279. In other computer crimes, many states have adopted broader jurisdiction requirements that encompass the global nature of the Internet. *See* Eric J. Bakewell et al., *Computer Crimes*, 38 AM. CRIM. L. REV. 481, 519 (2001) (citing Terrence Berg, *State Criminal Jurisdiction in Cyberspace: Is There a Sheriff on the Electronic Frontier?*, 79 MICH. B.J. 659, 661 (2000)).

280. *See Senate Hearing*, *supra* note 145 (statement of Frederick Schauer) (arguing that the procedural and substantive obstacles to enforcing obscenity may make PROTECT, a bill otherwise constitutional because of the inclusion of *Miller* requirements, ineffective).

281. *Ferber*, 458 U.S. at 764-65.

282. *See id.* at 764.

283. *Free Speech Coalition*, 535 U.S. at 250-51.

terial than sexually explicit images produced with real children. Given the current backdrop, the war against child pornography—and specifically, virtual images—must be waged with *Miller*. In short, though *Miller* may not be the best method of abolishing the market for child pornography, it seems to be the most certain.

CONCLUSION

In the aftermath of *Free Speech Coalition*, Congress needs to rethink its approach to regulating virtual child pornography. Unless Congress can persuade the Court that the existence of virtual child pornography directly harms children, and legislation is necessary to enforce the existing laws, restrictions like those in the CPPA and COPPA will likely continue to be deemed unconstitutional. Whether the Court will ever accept that the mere existence of child pornography, virtual or real, creates direct harm to children is an open question. However, if the dire predictions are correct and more children are molested because of the *Free Speech Coalition* decision, then, absent more convincing empirical evidence of primary harm, both the federal and state legislatures must find a constitutional way to protect the nation's children from abuse. Though the future is uncertain, there are strong arguments to be made that COPPA is little more than just a loosely reworded version of the very statute the Supreme Court struck down in *Free Speech Coalition*. And while courts are attempting to determine whether the rewording narrows the bill's application enough to pass constitutional muster, time and resources are directed toward arguing semantics and away from prosecuting purveyors of child pornography and obscenity.

In the end, critics of the Court's decision in *Free Speech Coalition* may not be satisfied with a *Miller* response. Nonetheless, to be certain that at least some, if not most, of the worst purveyors of pornography are prosecuted, Congress should revise COPPA to comply with *Miller*, ensuring that the law prohibits at least "hard core" virtual child pornography. If existing obscenity laws are enforced effectively, the law will, as it should, protect both the sanctity of our ideas and the innocence of our children.

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THE *KYLLO* CONUNDRUM: A NEW STANDARD TO ADDRESS TECHNOLOGY THAT REPRESENTS A STEP BACKWARD FOR FOURTH AMENDMENT PROTECTIONS

INTRODUCTION

An oft-quoted maxim of judicial wisdom is Oliver Wendell Holmes's observation that "the life of the law has not been logic; it has been experience."[1] Applied to the field of thermal imaging surveillance technology, this maxim demonstrates the complicated and often conflicting standards by which application of technology has been judicially evaluated. The most recent development in this area of technological jurisprudence has been the Supreme Court's opinion in *Kyllo v. United States*,[2] where a sharply divided court concluded that use of a thermal imaging device constituted a search that invoked the protection of the Fourth Amendment.[3] The Court also concluded that a new "bright line" needed to be drawn so that courts could apply Fourth Amendment doctrines to new and evolving technologies.[4]

Part I of this comment reviews the skeleton of Fourth Amendment analysis, from its basis in trespass and property to the advent of the *Katz* two-prong test, and the application of Fourth Amendment analysis to other modern and new technologies. Part II discusses thermal imaging basics and prior decisions addressing the application of the Fourth Amendment to this type of scan. Part III analyzes the Court's decision in *Kyllo v. United States*. Part IV concludes that the Court actually returned to an intransigent view of Fourth Amendment application; one that is dangerously ill-equipped to handle future evolution of surveillance technology.

I. THE EVOLUTION OF THE FOURTH AMENDMENT WITH RESPECT TO EVOLVING SURVEILLANCE TECHNOLOGY

A. Early Origins and History

The early American colonial experience with unconstrained writs of assistance produced a fundamental distrust of unfettered investigatory powers.[5] British common law had established the primacy of a man's

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1. OLIVER WENDELL HOLMES, THE COMMON LAW (1881), *reprinted in* PRAGMATISM: A READER, at 137 (Louis Menand ed.,Vintage Books 1997).

2. 533 U.S. 27 (2001).

3. *Kyllo*, 533 U.S. at 40.

4. *Id.* at 36, 40.

5. *See, e.g.*, Navigation Act, 1662, 13 & 14 Car. II, c. 11, § 5 (Eng.) (This investigatory power is reflected in the British Navigation Acts, which authorized officials to "go into any house,

domicile, but the colonists found little comfort in this concept when this protection was tested against the magistrates' authorities.[6] In order to enforce colonial revenue laws, British authorities used writs of assistance to authorize the bearer to enter into any house or other place to conduct a search for taxable commodities.[7] In response to the predictable abuses that occurred, the drafters of the Bill of Rights adopted the Fourth Amendment, guaranteeing that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[8] As interpreted by the courts over the years, this has come to stand for the need to ensure dispassionate judicial review of evidence prior to issuing a warrant to law enforcement personnel.[9]

As the body of law supporting the Fourth Amendment has grown, three essential doctrines have developed that are specifically applicable to the integration of new technology into the police investigatory arsenal. The first doctrine concerns the need and ability of law enforcement personnel to secure a warrant prior to surveillance activities. The second of these doctrines involves the shifting recognition of property rights as invoking a fundamentally different level of Constitutional protection. The final doctrine considers the relationship between Fourth Amendment protections and various private and administrative searches.

B. The Shift Away from Warrants to Reasonableness

One of the central debates that has influenced the development of Fourth Amendment jurisprudence is whether warrantless searches can pass constitutional muster.[10] This has clear application today as courts struggle to define the scope of police investigatory power in light of an

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shop, cellar, warehouse or room . . . and in case of resistance, to break open doors, chests, trunks and other package, there to seize, and from thence to bring, any kind of goods or merchandize whatsoever, prohibited and uncustomed.").

6. *See* Semayne's Case, 77 Eng. Rep. 194, 194 (K.B. 1604) (citing the famous proposition that "every man's house is his castle").

7. O.M. Dickerson, *Writs of Assistance as a Cause Of the American Revolution*, *in* THE ERA OF THE AMERICAN REVOLUTION 40, 40-41, 43-44 (Richard B. Morris ed., 1939).

8. U.S. CONST. amend. IV.

9. *See* Johnson v. United States, 333 U.S. 10, 13-14 (1948); Mark Young, *What Big Eyes You Have!: A New Regime for Covert Government Surveillance*, 70 FORDHAM L. REV. 1017, 1047-48 (2001).

10. *Compare* Trupiano v. United States, 334 U.S. 699, 705 (1948) (expressing the "cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable"), *and* Chimel v. California, 395 U.S. 752, 761 (1969) ("The [Fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that 'no Warrants shall issue, but upon probable cause,' plays a crucial part."), *with* United States v. Rabinowitz, 339 U.S. 56, 66 (1950) (stating that the relevant test is "not whether it is reasonable to procure a search warrant, but whether the search was reasonable").

ever-evolving technological landscape that makes searches less intrusive, quicker, and easier to conduct.[11] The starting point for the debate involves revisions to the draft of the Fourth Amendment submitted by James Madison. Madison's introduced version provided: "The rights of the people to be secured . . . from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause . . . ."[12] At some point before final ratification, the House defeated a motion to substitute the phrase "and no warrant shall issue" for the phrase "by warrants issuing."[13] However, the text of the final amendment includes this supposedly defeated provision, invoking decades of debate about whether the two clauses—"the right of the people to be secure . . . against unreasonable searches" and "and no Warrants shall issue, but upon probable cause"—are to be read together (with searches presumptively unreasonable if they lack a warrant), or if they each stand alone (allowing for the recognition of a "reasonable" warrantless search).[14]

Early Supreme Court decisions seemed to support the former interpretation, indicating strong preference for police investigatory activities supported by warrants.[15] However, the Court gradually began to support the latter interpretation. Starting in the arena of "searches incident to arrest," courts began eroding the warrant requirement as they recognized a "well established right of law enforcement officers to arrest without a warrant for a felony committed in their presence."[16]

This exception to the need to obtain a warrant blossomed into protection for all "reasonable searches," as recognized in the seminal case of *United States v. Rabinowitz*.[17] Since that decision, the Court has vacillated between these two competing doctrinal approaches,[18] looking most recently to enhance the power of law enforcement by recognizing that searches themselves must only comport with a general "reasonableness"

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11. *See, e.g., Kyllo*, 533 U.S. at 34, 36.

12. 1 ANNALS OF CONG. 440-41, 450, 452 (Joseph Gales ed., 1789).

13. NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 101-03 (1937).

14. *See* Scott Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 384 (1988).

15. *See* Boyd v. United States, 116 U.S. 616, 627, 630 (1886) (approving of Lord Camden's argument that "it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass").

16. *Trupiano*, 334 U.S. at 704 (overruled on other grounds); *see also* Agnello v. United States, 269 U.S. 20, 30 (1925) (observing that, in American jurisprudence, the legality of a search incident to a lawful arrest is not in doubt); Carroll v. United States, 267 U.S. 132, 158 (1925) (recognizing the legality of a search of an individual following a lawful arrest); Weeks v. United States, 232 U.S. 383, 392 (1914) (noting the uniform acceptance of the government's right to search the person of the accused upon a legal arrest of that person); Sundby, *supra* note 14, at 387-90.

17. 339 U.S 56, 65-66 (1950).

18. *See Chimel*, 395 U.S. at 761 ("In the scheme of the Amendment, therefore, the requirement that 'no Warrants shall issue, but upon probable cause,' plays a crucial part.").

criteria.[19] This shift away from a hard and fast warrant requirement has been a precursor to the rise of balancing tests, designed to measure "reasonableness" by weighing governmental regulatory interest against the individual's privacy interest.[20] Clear application of this phenomenon can be seen in the next area of Fourth Amendment evolution, the transition from property-based claims to a personal sense of privacy.

C. Property or Portable Reasonableness?

1. Actual Physical Invasions

As the courts strayed from the presumptive unconstitutionality of a warrantless search or seizure, it became necessary to determine when the Fourth Amendment applied. In order for Fourth Amendment protections to apply, there must be a "search" under the color of official action, with a subsequent attempt to use what is seized.[21] The early jurisprudential basis for privacy rights was derived from English common law, reflecting Lord Camden's idea that "the great end for which men entered society was to secure property . . . [and] every invasion of private property, be it ever so minute, is a trespass."[22] The Supreme Court echoed this property-based rationale in an early case involving the application of developing technology, *Olmstead v. United States*.[23] In this case, the Supreme Court concluded that wiretapping was not a constitutionally recognizable search, relying principally upon the lack of physical invasion of the defendant's property.[24] Specifically, a 5-4 majority concluded that the wiretapping was permissible because (1) the agents gained access to the telephone wires without any "entry of the houses or offices of the defendants," and (2) the agents obtained the content of the conversations that passed over the wires but did not acquire physical objects.[25] In a somewhat ominous note foreshadowing later developments in this area of law, Justice Brandeis in his dissent noted that the "progress of science in furnishing the government with means of espionage is not likely to

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19. *See* Matthew Pring, Survey, *The Death of A Doctrine: The 10th Circuit Court of Appeals and Random Suspicionless Urine Drug Testing Eroding the "Special Needs Doctrine,"* 79 DENV. U. L. REV. 457, 458 (2002); *see also* Illinois v. Rodriguez, 497 U.S. 177, 184-86 (1990); New Jersey v. T.L.O., 469 U.S. 325, 337, 340-43 (1985).

20. *See, e.g.*, *T.L.O.*, 469 U.S. at 337.

21. *See* Fredrick Alexander & John Amsden, *Scope of the Fourth Amendment*, 75 GEO. L.J. 713, 714 (1987); *see also* Burdeau v. McDowell, 256 U.S. 465, 475 (1921). *But see* State v. Helfrich, 600 P.2d 816, 818-19 (Mont. 1979) (holding that under the Montana Constitution, the right to privacy is protected from actions by both state and private actors, extending protection to all invasive actions).

22. Entick v. Carrington, 95 Eng. Rep. 807, 817-18 (K.B. 1765).

23. 277 U.S. 438, 464 (1928).

24. *See Olmstead*, 277 U.S. at 466.

25. *Id.* at 464-65.

stop with wire tapping."[26] The persistence of this "actual physical invasion" test is seen in the fact that that this property-based view of the Fourth Amendment persevered even after wiretapping was made unlawful by statute.[27]

2. The Introduction of "Reasonableness"

New technology and an evolving recognition of the limits of property law to address privacy interests eventually produced a fundamental shift in the basis for Fourth Amendment protection. In the case of *Katz v. United States*[28], the Supreme Court rejected Fourth Amendment protection of property, ruling instead that the Amendment "protects people, not places."[29] In *Katz*, FBI agents overheard the defendant's end of a telephone conversation by attaching an electronic listening and recording device to the exterior of the public telephone booth from which he was calling.[30] The Court refused to decide the issue on the basis of whether a person has a personal right of privacy in a phone booth based on property rights.[31] Instead, the Court found the use of this "detectaphone" constituted a search invoking Fourth Amendment protections, since what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[32] In doing so, the Court shifted the focus of Fourth Amendment jurisprudence to the individual and away from her property.[33] As the Court noted in reaching its final holding, "One who . . . shuts the door behind him . . . is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world."[34]

The two-part test proposed by Justice Harlan in his concurring opinion in *Katz* eventually came to be recognized as the new measuring stick for the legitimacy of government searches.[35] The first prong of the test involves evaluating whether the individual in question "exhibited an ac-

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26. *Id.* at 474 (Brandeis, J., dissenting).

27. *See* Frank Eichenlaub, *Carnivore: Taking a Bite Out of the Fourth Amendment?*, 80 N.C. L. REV. 315, 334 (2001); *see also* Silverman v. United States, 365 U.S. 505, 507-12 (1961) (ruling evidence gathered by law enforcement officers inadmissible because the evidence was gathered through means of a listening device that had intruded unlawfully upon the premises occupied by the defendants); Goldman v United States, 316 U.S. 129, 133-35 (1942) (holding that officers' use of a "detectaphone" to hear defendants' conversations emanating from next room did not constitute trespass or violation of Fourth Amendment).

28. 389 U.S. 347 (1967).

29. *Katz*, 389 U.S. at 351.

30. *Id.* at 348.

31. *Id.* at 350.

32. *Id.* at 351.

33. *Id.*

34. *Id.* at 352.

35. *See id.* at 361 (Harlan, J., concurring); Jonathan Todd Laba, *If You Can't Stand the Heat, Get Out of the Drug Business: Thermal Imagers, Emerging Technologies, and the Fourth Amendment*, 84 CAL. L. REV. 1437, 1454 (1996).

tual (subjective) expectation of privacy."[36] Many judicial commentators have criticized this first prong as being circular in nature.[37] Even the creator of the test, Justice Harlan, came to recognize its limitations, explaining in *United States v. White*,[38] "Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present."[39] This eventually led Justice Harlan to reject this prong of the test in its entirety, stating that the Court "must . . . transcend the search for subjective expectations."[40] Correspondingly, as technology allows new levels of intrusiveness into the private domain, and citizens become aware of these new surveillance techniques, their subjective expectations of privacy must necessarily be lowered.[41]

The second prong of the *Katz* test involves assessing whether one has a legitimate expectation of privacy that "society is prepared to recognize as 'reasonable.'"[42] As the Supreme Court has noted, there are some expectations that society is simply not prepared to accept.[43] In practice, this standard has come to reflect a balancing test between the needs of law enforcement and the importance of the individual interest threatened; if societal standards dictate that there is a lesser expectation of privacy in a particular area, then the scope of the invasiveness may increase.[44] Criticism has been directed at this prong of the test because it fails to include

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36. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

37. *See* Laba, *supra* note 35, at 1445.

38. 401 U.S. 745 (1971).

39. *White*, 401 U.S. at 786 (Harlan, J., dissenting). *But see* Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979) (noting that, in certain circumstances, the two-prong *Katz* test would be an inadequate measure of Fourth Amendment protections. For example, the government could not destroy all grounds of subjective expectation by simply announcing that henceforth all homes would be subject to warrantless entry, and thus destroy the legitimate expectation of privacy.).

40. *White*, 401 U.S. at 786 (Harlan, J., dissenting).

41. *See* Melvin Gutterman, *A Formation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 677 (1988).

42. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

43. *See* Gutterman, *supra* note 41, at 665-66; *see also* California v. Greenwood, 486 U.S. 35, 39-41 (1988) (holding that no expectation of privacy that society would recognize as reasonable existed in garbage left outside a home); California v. Ciraolo, 476 U.S. 207, 214 (1986) (recognizing that no expectation of privacy remained in an area outside of a home that could be observed by all commercial air travel); Illinois v. Andreas, 463 U.S. 765, 773 (1983) (holding that there could be no reasonable expectation of privacy for material placed in a shipping container subsequently opened and inspected by customs agents); *Smith*, 442 U.S. at 743-44 (rejecting petitioner's claim of a reasonable expectation of privacy for numbers dialed on a telephone after police had monitored and gathered such numbers through use of a pen register); United States v. Miller, 425 U.S. 435, 437, 440-43, 445 (1976) (identifying no reasonable expectation of privacy in bank records).

44. *See* Pring, *supra* note 19, at 458. *Compare* United States v. Ross, 456 U.S. 798, 811 (1982) (noting that expectations of privacy in personal luggage and other closed containers must be substantially greater than in the area of an enclosed automobile), *with* Arkansas v. Sanders, 442 U.S. 753 (1979) (noting if the personal luggage is found in a car, the expectation of privacy must correspondingly be less).

some appraisal of underlying conduct.[45] For instance, if two kidnappers take their victim to a secluded location, they would expect privacy in this location. However, given the criminal nature of their activities, a court would probably not recognize their expectations as reasonable, irrespective of this second "objective" expectation of privacy test.

The *Katz* test has been applied to a number of "new" technologies in an effort to define the proper balance between investigative necessity and individual rights.[46] Regarding binoculars and telescopes, courts have held that use of these devices does not constitute a search.[47] The Supreme Court has twice addressed the use of beeper tracers in the cases of *United States v. Knotts*[48] and *United States v. Karo*,[49] developing a somewhat contradictory line of precedence for use of this technology. The *Knotts* agents used a beeper tracer to monitor a chloroform container while inside a cabin.[50] The Court found that the beeper tracer had initially been used on public streets, and applied the second prong of the *Katz* test to conclude that since there could be no legitimate expectation of privacy on these public streets, there was no search.[51] However, in the *Karo* case, the Court concluded that a beeper being monitored by agents while inside a house revealed "a critical fact about the interior of the premises that [they] . . . could not have otherwise obtained without a warrant."[52] As the Court expounded, "Private residences are places in which the individual normally expects privacy free of government intrusion . . . and that expectation is plainly one that society is prepared to recognize as justifiable."[53]

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45. *See* John M. Burkoff, *When Is a Search Not a "Search?" Fourth Amendment Doublethink*, 15 U. TOLEDO L. REV. 515, 527-29 (1984) (stating the subjective component of *Katz* distorts the protections of the Fourth Amendment); *see also White*, 401 U.S. at 786 (Harlan, J., dissenting) ("This question must . . . be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement.").

46. *See* Gutterman, *supra* note 41, at 717 (arguing against questions of search and seizure depending on technology).

47. *See* Texas v. Brown, 460 U.S. 730, 739-40 (1983) (holding that the use of a searchlight is the same as the use of field glasses, therefore not a search); United States v. Minton, 488 F.2d 37, 38 (4th Cir. 1973) (holding that use of binoculars is not a search); People v. Hicks, 364 N.E.2d 440, 444 (Ill. App. Ct. 1977) (holding that use of night vision binoculars is not a search).

48. 460 U.S. 276 (1983).

49. 468 U.S. 705 (1984).

50. *Knotts*, 460 U.S. at 277-79.

51. *Id.* at 281-82, 285.

52. *Karo*, 468 U.S. at 715.

53. *Id.* at 714.

3. Statutory and Judicial Interplay Involving Surveillance Technology

Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[54] passed the year after the *Katz* decision, specifically addressed the subject of wiretapping and electronic surveillance.[55] Under this legislation, government officials were given the authority to apply to a federal judge for an order permitting interception of wire or oral communications, when such activity may provide evidence of certain enumerated crimes.[56] A judge may then grant the order *ex parte*, upon belief of probable cause that the named individual is committing the alleged enumerated offense, but for no longer than "is necessary to achieve the objective of the authorization," or in any account, not longer than 30 days.[57] One other important factor associated with this provision is that when one of several named officials finds that "an emergency situation exists that involves (i) immediate danger of death . . . , (ii) conspiratorial activities threatening the national security interest, or (iii) conspiratorial activities characteristic of organized crime," an interception without prior judicial authorization is permitted.[58]

Dalia v. United States[59] reflects how the Supreme Court has viewed the broad authorizations statutorily established by Congress. In *Dalia,* F.B.I. agents entered an office to install a listening device and then reentered to remove it, all pursuant to a court order obtained under the Title III authorizations.[60] Rejecting arguments about the trespassory nature of the agents' activities, the Court concluded that:

> one simply cannot assume that Congress, aware that most bugging requires covert entry, nonetheless wished to except surveillance requiring such entries from the broad authorization of Title III . . . . Those considering the surveillance legislation understood that, by authorizing electronic interception of oral communications in addition to wire communications, they were necessarily authorizing surreptitious entries.[61]

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54. 18 U.S.C. §§ 2510-20 (2000).

55. *See id.*

56. *Id.* § 2516(1).

57. *Id.* § 2518.

58. *Id.*; *see also* Geoffrey North, *Carnivore in Cyberspace: Extending the Electronic Communications Act's Framework to Carnivore Surveillance*, 28 RUTGERS COMPUTER & TECH. L.J. 155 (2002) (discussing the Act and digital surveillance).

59. 441 U.S. 238 (1979).

60. *Dalia*, 441 U.S. at 241, 245.

61. *Id.* at 252.

The *Dalia* decision became controversial for its additional holding that a court did not need to specifically authorize the covert entry of agents.[62] The relevance of this point to other forms of electronic surveillance can be found in Justice Brennan's dissent from the case, in which he noted that the "practice entails an invasion of privacy of constitutional significance distinct from that which attends nontrespassory surveillance."[63] Inherent in the dissent's position is a property-based distinction that subscribes to the idea that the Fourth Amendment offers different levels of protections depending upon the degree of actual physical intrusion associated with the process.

D. The Interplay Between Private and Public Actors

1. Third Party Actor Involvement

In the *Katz* decision, the Supreme Court concluded, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[64] This language is the starting point for judicial review of the actions of third parties as proof of the scope of personal privacy expectations. Primarily, the Fourth Amendment protects individuals from government action, and as such, it applies only when a government actor is involved.[65] However, third parties can act as agents of the government, thereby invoking the protections of the Fourth Amendment.[66]

Another rationale for not applying Fourth Amendment protections to private searches and seizures is that as a person exposes something to a private actor, both his subjective expectation of privacy and the objective status society is willing to accord that expectation decrease.[67] As one example of this, when a person conveys information to a third party, even during an apparently private conversation, that person cannot reasonably expect the information will remain protected within the context of the Fourth Amendment.[68] This doctrine has been extended to cover the actions of third party institutions, such as a bank[69] or telephone com-

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62. *Id.* at 257 ("Nothing in the language of the Constitution . . . suggests that . . . search warrants also must include a specification of the precise manner in which they are to be executed.").

63. *Id.* at 259-60 (Brennan, J., dissenting).

64. *Katz*, 389 U.S. at 351.

65. *See* Alexander & Amsden, *supra* note 21.

66. *See id.* at 715 & n.13 (discussing various court tests to determine if an actor is a government agent).

67. *See* Brian Serr, *Great Expectations of Privacy: A New Model For Fourth Amendment Protection*, 73 MINN. L. REV. 583, 627 (1989).

68. *See* Hoffa v. United States, 385 U.S. 293, 302-03 (1966) (ruling on a government informant who reported the conversation to government agents).

69. *Miller*, 425 U.S. at 442-43.

pany,[70] when these actors subsequently convey the information to law enforcement personnel.

2. Open Fields Surveillance

The most significant application of this doctrine to the field of *Kyllo*-type surveillance comes from the so-called "open fields" doctrine. Under this principle, espoused initially in the case of *Oliver v. United States*,[71] the Court started by recognizing "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."[72] The Court then concluded "open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."[73] Consequently, in areas outside the immediate surroundings of a home, individuals have a reduced expectation of privacy and society is prepared to recognize only minimal protections as reasonable.[74] If government actors can view areas the general public can also view, the search is constitutionally permissible, because the area is akin to an "open field."[75] For example, in *Florida v. Riley*[76] the Court concluded that observation of a greenhouse by a police helicopter was a constitutionally permissible search because the test was "whether [the helicopter] was in the public airways at an altitude at which members of the public travel with sufficient regularity that respondent's expectation was not one that society is prepared to recognize as 'reasonable.'"[77] Here again, the fact that a private citizen could observe what law enforcement officials ultimately saw was used as proof by the Court that no legitimate expectation of privacy existed, even in an area closely associated with "the overriding respect for the sanctity of the home."

3. Private Naked Eyes

The final relevant application of private actor searches depends on the general public's availability and current use of the surveillance technology employed by government actors. The Court has concluded that when devices employed by law enforcement personnel merely enhance the surveillance capability that ordinary citizens could use to observe a

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70. *Smith*, 442 U.S. at 742, 745-46.
71. 466 U.S. 170 (1984).
72. *Oliver*, 466 U.S. at 178.
73. *Id.* at 179.
74. *See* Susan Moore, *Does Heat Emanate Beyond the Threshold?: Home Infrared Emissions, Remote Sensing, and the Fourth Amendment Threshold*, 70 CHI.-KENT L. REV. 803, 819 (1994).
75. *See* Young, *supra* note 9, at 1054.
76. 448 U.S. 445 (1989).
77. *Riley*, 448 U.S. at 446.

defendant's activities, the Fourth Amendment is not implicated.[78] However, with increasingly sophisticated technology, the likelihood that the general public would use these technologies decreases. When this occurs, courts have been more willing to circumscribe police activities by invoking Fourth Amendment protections.[79] The natural progression of technology has required judicial officers to consider the use of items as commonplace as binoculars and as complex as thermal imaging devices.

II. USE OF THERMAL IMAGING TECHNOLOGY AND JUDICIAL REVIEW

A. *What is Thermal Imaging Technology?*

A basic understanding of thermal imaging technology can help define precisely what sorts of intrusions occur when these devices are employed by law enforcement personnel. Any object with a temperature above absolute zero emits radiation in the infrared spectrum.[80] A thermal imaging device detects this infrared radiation and then converts the heat reading into a two-dimensional picture.[81] The picture depicts various shades of gray according to the levels of heat radiated by objects; hotter objects appear lighter in color due to the fact that they radiate more infrared energy.[82] The thermal imager neither alters nor enhances the radiation, but solely detects differences in heat between the target and the ambient background.[83] Most importantly, there are no beams penetrating a structure when the device is employed; thermal imagers merely passively scan the surrounding environment to measure respective heat signatures.[84]

Thermal imaging technology has been widely adopted by law enforcement personnel in the search for illegal drug cultivation.[85] Indoor

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78. *See* Moore, *supra* note 74, at 851; *see also* Dow Chemical Co. v. United States, 476 U.S. 227, 239 (1986) (holding use of an aerial camera did not invoke Fourth Amendment protections given); *Knotts*, 460 U.S. at 285 (holding that an electronic tracking device attached to a car did not constitute a search because the movements of the car could be observed by the naked eye).

79. *See Karo*, 468 U.S. at 720-21 (holding that a beeper tracer that reveals information not available without unaided surveillance does invoke Fourth Amendment protections).

80. Thomas D. Colbridge, *Thermal Imaging: Much Heat but Little Light*, FBI LAW ENFORCEMENT BULLETIN 18 (Dec. 1997), *at* http://www.fbi.gov/publications/leb/1997/leb97.htm.

81. *Id.*

82. *Id.*; *see also* M. Annette Lanning, *Thermal Surveillance: Do Infrared Eyes in the Sky Violate the Fourth Amendment?*, 52 WASH. & LEE L. REV. 1771, 1773 (1995) (describing how FLIR systems operate).

83. *See* Matthew L. Zabel, *A High-Tech Assault on the "Castle": Warrantless Thermal Surveillance of Private Residences and the Fourth Amendment*, 90 NW. U. L. REV. 267, 280 n.100 (1995) (stating that thermal imaging devices detect only heat emissions).

84. Mindy G. Wilson, *The Prewarrant Use of Thermal Imagery: Has This Technological Advance in the War Against Drugs Come at the Expense of Fourth Amendment Protections Against Unreasonable Searches?*, 83 KY. L.J. 891, 897 (1995).

85. *See* United States v. Field, 855 F. Supp. 1518, 1518-19 (W.D. Wis. 1994); United States v. Penney-Feeney, 773 F. Supp. 220, 225-28 (D. Haw. 1991).

growing of marijuana requires high intensity growth lamps for optimum yields.[86] These lamps produce hot exhaust gases that must be vented in order to maintain an optimum growing temperature of 68 to 72 degrees Fahrenheit.[87] Thermal imaging devices allow law enforcement personnel to detect hot exhaust gases emanating from structures by comparing the relative heat passively radiated from different environments.[88] An agent is able to tell the relative heat signature of an object by simply directing a thermal imaging device at it; no probes or sampling devices need to be attached to the target structure.[89] A thermal imaging device requires no special modification to be employed in this drug detection role; no transmission of penetrating rays or pulses is necessary to see the exhaust gases.[90]

B. *Pre-*Kyllo *Decisions Dealing with the Use of Thermal Imaging Devices*

The United States Court of Appeals for the Eighth Circuit was the first court in the federal system to rule on the pre-warrant use of thermal imaging devices. In the case of *Pinson v. United States*,[91] the court concluded that the use of these devices did not constitute a search because they failed the second prong of the *Katz* test.[92] The court decided that even if a defendant could show an expectation of privacy, that expectation would not be one that society would accept as reasonable for two reasons.[93] First, the court concluded that thermal imaging devices merely detected waste heat, and by analogy, this was similar to the waste left at a curb.[94] The significance of this reasoning was that the Supreme Court had concluded, in the case of *California v. Greenwood*,[95] that the police could search waste left at a curb because the individual had demonstrated

86. Wilson, *supra* note 84, at 893.

87. Lynne M. Pochurek, *From the Battlefield to the Homefront: Infrared Surveillance and the War on Drugs Place Privacy Under Siege*, 7 ST. THOMAS L. REV. 137, 150 n.99 (1994).

88. Tracy M. White, *The Heat is On: The Warrantless Use of Infrared Surveillance to Detect Indoor Marijuana Cultivation*, 27 ARIZ. ST. L.J. 295, 295 (1995).

89. *See* United States v. Ishmael, 48 F.3d 850, 857 (5th Cir. 1995) (holding the use of a thermal imaging device to be passive and non-intrusive); Wilson, *supra* note 84, at 896-97.

90. Wilson, *supra* note 84, at 896 n.54.

91. 24 F.3d 1056 (8th Cir. 1994).

92. *See* Sean D. Thueson, *Fourth Amendment Search—Fuzzy Shades of Gray: The New "Bright Line" Rule in Determining When the Use of Technology Constitutes a Search*, 2 WYO. L. REV. 169, 183-84 (2002).

93. *Pinson*, 24 F.3d at 1058-59.

94. *Id.*

95. 486 U.S. 35 (1988).

that he no longer maintained an expectation of privacy in the contents of that waste.[96]

The second reason the court concluded that there was no search was that the use of infrared sampling devices was similar to a search by a canine unit. As the court noted, "Just as odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine sniff, so also does heat escape a home and is detected by the sense-enhancing [thermal imager]."[97] Again, the significance of this comparison is that in the case of *United States v. Place*,[98] the Supreme Court had concluded that a canine search by a narcotics detection dog was clearly not a search within the meaning of the Fourth Amendment.[99]

Concerns about the application of this rationale to thermal imaging devices can be found from a closer scrutiny of a typical "canine-sniff" decision. The Ninth Circuit Court of Appeals' decision in the case of *United States v. Solis*[100] is illustrative of this line of thinking. The court concluded that a canine sniff did not constitute a search because "[n]o sophisticated mechanical or electronic devices were used [and the] . . . investigation was not indiscriminate, but solely directed to the particular contraband."[101] This stands in obvious contrast to passive heat detection where sophisticated mechanical devices are used. However, the majority of pre-*Kyllo* courts that considered the constitutional implications of thermal imaging devices agreed with the Eighth Circuit, concluding that their use did not constitute a search.[102]

In addition to the "waste heat" and "canine enhancement" doctrines, courts have also relied upon the "plain view" doctrine to conclude that use of these devices is not a search.[103] The "plain view" doctrine simply states that officers are not required to obtain a warrant prior to observing details that would be readily observable by any member of the public.[104] This is an extension of the "open fields" doctrine discussed above. Although applying "plain view" to seeing through walls appears somewhat

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96. *Greenwood*, 486 U.S. at 35 ("It is common knowledge that plastic garbage bags left along a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.").

97. *Pinson*, 24 F.3d at 1058.

98. 462 U.S. 696 (1983).

99. *Place*, 462 U.S. at 707 (Defendant's conviction was eventually overturned because the officers had detained the defendant's luggage for an unreasonable period of time and because the officers failed to communicate to the defendant where they were taking his luggage.).

100. 536 F.2d 880 (9th Cir. 1976).

101. *Solis*, 536 F.2d 880 at 882.

102. *E.g.*, *Ishmael*, 48 F.3d 850; United States v. Myers, 46 F.3d 668 (7th Cir. 1995); *Pinson*, 24 F.3d 1056; United States v. Ford, 34 F.3d 992 (11th Cir. 1994); State v. McKee, 510 N.W.2d 807 (Wis. Ct. App. 1993); State v. Cramer, 851 P.2d 147 (Ariz. Ct. App. 1992).

103. *Ishmael*, 48 F.3d at 853.

104. *See* California v. Ciraolo, 476 U.S. 207, 215 (1986); Dow Chemical Co. v. United States, 476 U.S. 227, 236-37 (1986).

attenuated based on common English definitions, when the subject matter is an object's invisible heat signature, at least one court has indicated that if used from a position where any member of the public could lawfully be located, an agent has not performed a search.[105] Support for this approach was also drawn from the Court's decisions in *Florida v. Riley*[106] and *Dow Chemical Co. v. United States*,[107] cases involving the first applications of technology generally available to the public as a means to restrict the sphere of privacy rights. [108]

The pre-*Kyllo* minority viewpoint that determined that use of a thermal imaging device did constitute a search relied upon different rationales to reach this conclusion. Some courts expressed a concern about revealing the "intimate details regarding activities occurring within the sanctity of the home,"[109] while others focused on the "indiscriminate" nature of the device.[110] The first court to conclude that use of a thermal imaging device did constitute a search, found that such searches were "at least as intrusive" as the electronic beeper that was the subject of the Supreme Court's holding in the *Karo* case.[111]

Other courts have rejected the claim that the passive nature of these devices precludes them from intruding upon the sanctity of the home, concluding instead that the principle reason for use of this technology is to enable an agent to view intimate details of the home.[112] The case of *State v. Young*,[113] decided by the Washington Supreme Court, is illustrative of minority viewpoints on waste and canine sniff analogies. In *Young*, the court decided that the emission of waste heat was not similar to the garbage at issue in the *Greenwood* case because unlike the disposal of garbage, a person does not foresee the use of sophisticated instruments to detect waste heat emissions.[114] In a foreshadowing of the rationale used in the *Kyllo* case, the court noted that thermal imaging "produces an image of the interior of the home . . . [and allows] the government to intrude into the defendant's home and gather information about what occurs there."[115] The court also rejected the canine sniff analogy by es-

105. *See Ishmael*, 48 F.3d at 854.
106. 448 U.S. 445 (1989).
107. 476 U.S. 227.
108. *See Riley*, 448 U.S. at 446; *Dow Chemical Co.*, 476 U.S. at 238-39 (stating the conclusion that the plant area at issue fell somewhere between 'open fields' and curtilage for privacy interest purposes, and that surveillance of these areas with highly sophisticated devices might be constitutionally prohibited, but the mapmaking camera at issue in the case would not reveal enough intimate details to violate the Fourth Amendment).
109. Commonwealth v. Gindlesperger, 743 A.2d 898, 902 (Pa. 1999).
110. People v. Deutsch, 44 Cal. App. 4th 1224, 1231 (1996).
111. *See* State v. Young, 867 P.2d 593, 602 (Wash. 1994).
112. *Field*, 855 F. Supp. at 1518-19.
113. 867 P.2d 593.
114. *Id.* at 603.
115. *Id.*

tablishing that canine sniffs are unique because they detect the existence or non-existence of illegal drugs.[116]

These polar opposite outcomes, based upon essentially similar tests, illustrate that the *Katz* framework was ill-equipped to provide judicial consensus about the nature of an individual's right to privacy in light of technological advances. Courts diverged on both prongs of the *Katz* test, namely on what society considered reasonable and whether society was prepared to recognize that heat loss observation should be constitutionally protected.[117] *Kyllo* provided the Court with an opportunity to address these differing positions.

III. *KYLLO V. UNITED STATES*[118]

A. *The Facts of* Kyllo

In 1991, Special Agent William Elliot of the Department of the Interior, Bureau of Land Management, came to suspect Danny Kyllo was growing marijuana in his home.[119] Agent Elliot first attempted to confirm his suspicions by subpoenaing and then examining utility records to compare average electricity use against dwellings of similar size.[120] Based in part upon the confirmed higher electricity demand, Agent Elliot requested Staff Sergeant Daniel Haas of the Oregon National Guard to examine the triplex where Mr. Kyllo lived with a thermal imaging device.[121] In the early morning hours of January 16, 1992, a thermal scan was conducted from the passenger seat of Agent Elliot's vehicle, which was parked across the street from Mr. Kyllo's residence.[122] The scan took only a few moments and showed that the roof over the garage and a side wall of the petitioner's house were relatively hot compared to the rest of the home and to other homes in the triplex area.[123] Agent Elliot used this information, the higher electricity usage, and tips from informants to convince a federal Magistrate to issue a search warrant for Mr. Kyllo's

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116. *Id.* (citing *Place*, 462 U.S.at 707).

117. *See Gindlesperger*, 753 A.2d at 903 (holding "that the proper focus of our inquiry should be on whether Appellee was able to demonstrate a legitimate expectation of privacy in the heat-generating activities occurring within his home").

118. 533 U.S. 27 (2001).

119. *Kyllo*, 533 U.S. at 29.

120. United States v. Kyllo, 809 F. Supp. 787, 790 (D. Or. 1992), *aff'd in part*, United States v. Kyllo, 26 F.3d 134 (9th Cir. 1994), *opinion superseded*, United States v. Kyllo, 37 F.3d 526 (9th Cir. 1994), *rev'd*, United States v. Kyllo, 140 F.3d 1249 (9th Cir. 1998), *opinion withdrawn*, United States v. Kyllo, 184 F.3d 1059 (9th Cir. 1999), *opinion superseded*, United States v. Kyllo, 190 F.3d 1041 (9th Cir. 1999), *rev'd*, *Kyllo*, 533 U.S. 27 (Agent Elliot examined the utility records because higher power usage is consistent with the need to run high power growth lamps used to stimulate marijuana plant growth.). *But see Kyllo*, 190 F.3d at 1047 (stating that utility records may reveal high power usage, but do not by themselves disclose the purposes behind the higher consumption).

121. *Kyllo*, 140 F.3d at 1251.

122. *Kyllo*, 533 U.S. at 30.

123. *Id.*

home.[124] When the search was conducted, agents discovered "an indoor growing operation involving more than 100 plants," ultimately leading Mr. Kyllo to conditionally plead guilty to one count of manufacturing marijuana.[125]

The procedural history of the case is confusing, starting with the decision of the United States Court of Appeals for the Ninth Circuit to remand the case to the United States District Court for the District of Oregon for an evidentiary hearing to determine the constitutional implications of thermal imaging.[126] The district court subsequently concluded that given its non-intrusive nature, use of the thermal imager did not constitute a search, a conclusion with which a three judge panel of the Ninth Circuit disagreed.[127] The government then moved for rehearing, and the Ninth Circuit eventually affirmed the decision of the district court, holding that use of the thermal imaging device did not constitute a search.[128] The Supreme Court agreed to hear the case in the winter of 2000.[129]

B. The Kyllo *Ratio Decidendi*

The first interesting point to note about the Supreme Court's opinion in *Kyllo* is that Justice Scalia wrote the majority opinion for the court, joined by Justices Souter, Thomas, Ginsberg, and Breyer.[130] This is noteworthy because of Justice Scalia's nearly universal application of the principle of strict interpretation of the Constitution in assessing the implications of judicial decision-making.[131]

The Court introduces its analysis with a passage establishing the constitutional primacy of the home as being "at the very core of the Fourth Amendment."[132] The Court then cites precedent for the principle that "with few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."[133] However, the Court then notes that decisions have "decoupled violation of a person's Fourth Amendment rights from a trespassory violation of

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124. *Id.*
125. *Id.*
126. *Kyllo*, 37 F.3d at 531.
127. *Kyllo*, 140 F.3d at 1255.
128. *Kyllo*, 190 F.3d at 1041.
129. Kyllo v. United States, 530 U.S. 1305 (2000).
130. *Kyllo*, 533 U.S. at 30.
131. *See* Michael P. Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539 (2001); Daniel Farber, *The Scholarly Attorney as Lawyerly Judge: Stevens on Statutes*, 1992/1993 ANN. SURV. AM. L. xxxv, xxxvii; Brogan v. United States, 522 U.S. 398 (1998) (commenting on the standards of constitutional interpretation).
132. *Kyllo*, 533 U.S. at 31 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).
133. *Id.* (citing Illinois v Rodriguez, 497 U.S. 177, 181 (1990); Payton v. New York, 445 U.S. 573, 586 (1980)).

his property,"[134] citing the *Katz* decision for the familiar principle that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable."[135] The Court acknowledges that this principle has included the constitutional recognition of the legitimacy of home surveillance by authorities under certain circumstances.[136]

The majority then wastes no time in attacking this standard, citing, among other supporting documents, Justice Scalia's concurring opinion in *Minnesota v. Carter*,[137] for the proposition that the privacy-expectation doctrine is circular in nature.[138] Having thus concluded that the cornerstone test of Fourth Amendment application is flawed, the Court concedes that "it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even . . . uncovered portions of residences are at issue."[139] The majority then proceeds to draw the line at what they consider to be the "prototypical . . . area of protected privacy,"[140] the interior of homes. In rejecting the government's contention that pre-warrant use of a thermal imaging device is constitutional because it does not "detect private activities occurring in private areas,"[141] the Court notes that "any physical invasion of the structure of the home 'by even a fraction of an inch' [is] too much."[142] The Court then concludes by establishing a "firm line at the entrance to the house,"[143] ruling that "where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without a physical intrusion, the surveillance is a search and is presumptively unreasonable without a warrant."[144]

C. *The Dissent*

Justice Stevens authored the dissent, in which Chief Justice Rehnquist, Justice O'Conner, and Justice Kennedy joined.[145] Ironically, the dissent invokes the principle of strict constitutional interpretation, a Scalia refrain notably missing from the majority opinion, citing the Fourth Amendment for the principle of protecting the right of the people

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134. *Id.* at 32.
135. *Id.* at 33 (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).
136. *Id.* (citing Florida v. Riley, 458 U.S. 445 (1989); California v. Ciraolo, 476 U.S. 207 (1986); Smith v. Maryland, 442 U.S. 735 (1979)).
137. 525 U.S. 83 (1998).
138. *See Kyllo*, 533 U.S. at 34 (citing *Carter*, 525 U.S. at 97 (Scalia, J., concurring)).
139. *Id.*
140. *Id.*
141. *Id.* at 37.
142. *Id.* (quoting *Silverman*, 365 U.S. at 512).
143. *Id.* at 40.
144. *Id.*
145. *Id.* at 41 (Stevens, J., dissenting).

"to be secure in their houses,"[146] and not to extend that privacy to "heat emanating from a building."[147]

The dissent attacks the majority opinion on two grounds. First, Justice Stevens invokes shades of the plain view doctrine by comparing the surveillance conducted in the instant case to the ability of officers "to gather information exposed to the general public."[148] The dissent accuses the majority of deciding the case based upon "the potential of yet-to-be-developed technology," raising the specter of the Court issuing an advisory opinion based on facts not yet before them.[149] The dissent further elucidates this critique of over-inclusiveness by noting that this new protection blocks inferences about the interior of the home drawn from observation with sense-enhancing equipment.[150] Justice Stevens provides an example, noting that "under that expansive view . . . an officer using an infrared camera to observe a man . . . entering the side door of a house . . . carrying a pizza might conclude that its interior is now occupied by someone who likes pizza,"[151] an observation that would amount to an unconstitutional search under the majority's new test.[152]

The second critique by the dissent is that the term "in general public use" fails at its stated goal of drawing a line "not only firm but also bright."[153] The dissent notes "how much public use is general public use is not even hinted at by the Court's opinion,"[154] precluding establishment of a clear standard.[155] Interestingly, the central concern associated with this new standard is that there is no set or quantative standard for future judicial application, a critique applicable just as easily to the *Katz* test.[156] Therefore, courts are in no better position than they were before, left with a test without precedent and no workable definition or standard of "general public use."

As the use of technology like this becomes more common, "the threat to privacy will grow," and the vital protections of the Fourth Amendment will fail at precisely the time the general public has the

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146. *Id.* at 43 (Stevens, J., dissenting) (citing U.S. CONST. amend. IV).

147. *Id.* (Stevens, J., dissenting).

148. *Id.* at 42 (Stevens, J., dissenting).

149. *Id.* (Stevens, J., dissenting); *see* North Carolina v. Rice, 92 S. Ct. 402, 404 (1971) ("To be cognizeable in federal court, a suit must be definite and concrete, touching the legal relations of the parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief . . . as distinguished from an opinion advising what the law would be based upon a hypothetical state of facts.").

150. *Kyllo*, 533 U.S. at 42 (Stevens, J., dissenting).

151. *Id.* at 49 (Stevens, J., dissenting).

152. *Id.* (Stevens, J., dissenting).

153. *Id.* at 47 (Stevens, J., dissenting).

154. *Id.* (Stevens, J., dissenting).

155. *Id.* (Stevens, J., dissenting).

156. *Id.* (Stevens, J., dissenting).

greatest need of them.[157] This author's position is that, because of this failure, the Supreme Court should reject the new *Kyllo* test, and return to an insistence upon the fundamental value underlying the Fourth Amendment, the need for protection against unreasonable searches of not just a person's home, but also her "person, . . . papers, and effects."[158]

IV. THE *KYLLO* CONNUNDRUM: THE COURT FAILS TO ADVANCE A STANDARD THAT ACCOUNTS FOR THE FLEXIBLE NATURE OF PRIVACY RIGHTS

The majority in *Kyllo* acknowledges that the *Katz* decision marked a transition from a purely property-based approach to Fourth Amendment analysis, to a flexible protection tied to an individual's privacy interests.[159] In its critique of this judicial reasoning, the Court points out that because what is objectively reasonable varies with development of more invasive technology, a *Katz*-based analysis ultimately leads to "subjective and unpredictable" decisions.[160] However, the new test developed by the Court falls victim to this same critique in two critical areas. First, the *Kyllo* test fails in its adoption of the "device not in general use" standard. Second, the Court reverts back to a property-based analysis of Fourth Amendment rights, one ill-equipped to handle the challenges of an increasingly mobile and transitory society.

A. What is General Public Use?

To begin with, numerous commentators have criticized the *Kyllo* decision for its failure to articulate guidelines for what is meant by the term "device not in general public use."[161] As the dissent even notes, the majority's criteria suffers from the same defect as its intellectual predecessor in *Katz*, as the protections inherent in this test will fail as more intrusive equipment becomes increasingly available.[162] For example, hunters and other outdoorsmen[163] currently employ thermal imaging devices for private use, and consumers may soon see them installed on new vehicles.[164] Fire departments [165] and border patrols[166] are also pushing the

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157. *Id.* (Stevens, J., dissenting).

158. U.S. CONST. amend. IV.

159. Kyllo v. United States, 533 U.S. 27, 32 (2001).

160. *Kyllo*, 533 U.S. at 34.

161. *See* Sarilyn E. Hardee, *Why the United States Supreme Court's Ruling in* Kyllo v. United States *is Not the Final Word on the Constitutionality of Thermal Imaging*, 24 CAMBELL L. REV. 53, 69 (2001); Thueson, *supra* note 90, at 192-95.

162. *Kyllo*, 533 U.S. at 47 (Steven, J., dissenting).

163. *See* Accurate Locations, *Target Location Viewer: Thermal Imaging Detector, at* http:www.accuratelocators.com/targetinfo.htm (last visited Mar. 3, 2003).

164. *See* Raytheon, *Transportation: See Better, Decide Faster, Drive Safer, at* http:www.raytheoninfrared.com/transportation/index.html (last visited Mar. 3, 2003); United States v. Cusumano, 67 F.3d 1497, 1504 (10th Cir. 1995) (discussing application of thermal imaging technology).

use of this technology into new and unexpected areas. However, the dissent and other commentators have not reflected on the implications this standard has for the broad spectrum of Fourth Amendment protections, especially in light of the cumulative effects of the inevitable cross-application between residential and general uses of new technology.

Although the *Kyllo* ruling was limited to the context of investigation of the interior of a house, the majority opinion does espouse as one of its principal objectives the need to "account for more sophisticated systems that are already in use or development."[167] One very apparent critique of this line of thinking is that it violates the Court's long established prohibition against deciding issues that are not yet properly before the Court.[168] Another, more subtle, critique of this reasoning addresses its obvious implications for other aspects of Fourth Amendment protections. Although James Tomkovicz, the lawyer for Mr. Kyllo, believes that "it's hard to know what they'll do with equivalent technology outside the home," it's easy to see how application of this rule to other areas of Fourth Amendment search-and-seizure law could occur.[169] The pervasiveness of jurisprudential references to the *Greenwood* case (involving domicile-based activity) in non-residential applications demonstrates the ease with which home-oriented tests translate into other areas of search-and-seizure law.[170]

If the "general public use" test sufficiently provides protection for the residential "core of the Fourth Amendment,"[171] then courts will more likely allow use of invasive technology in areas less tied to the traditional Fourth Amendment centers of personal privacy: "persons, houses, papers, and effects."[172] Imagine a world where the commercial use of Internet "cookies" ultimately served to justify random scans of all e-mail, or government tracking of a citizen's Web use. Certainly, this would seem to be inside the spectrum of protection envisioned in the "papers . . . and

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165. *Firefighters Test New Thermal Imaging Devices During 3 Fires*, *at* http:www.nassaufire-rescue.com/thermal.html (last visited Mar. 3, 2003).

166. FLIR Systems, *Border Patrol*, *at* http:www.flir.com/ground/application.htm (last visited Mar. 3, 2003).

167. *Id.* at 36.

168. *See, e.g.*, Thueson, *supra* note 92, at 201.

169. Jeffrey Benner, Kyllo*: Taking the 5th on the 4th* (July 3, 2001), *at* http://www.wired.com-/news/privacy/0,1848,44785,00.html.

170. *See* Wabuni-Inini v. Sessions, 900 F.2d 1234 (8th Cir. 1990) (holding that use of an F-stop for exposing photographs sufficiently defeats a claim of Fourth Amendment protection, just as the trash in *Greenwood* displayed a similar lack of subjective expectation of privacy); United States v. Hall, 47 F.3d 1091 (11th Cir. 1995) (discussing the portability of the *Greenwood* test to commercial property); Powell v. State, 776 A.2d 700 (Md. Ct. Spec. App. 2001) (citing the *Greenwood* test in deriving its holding that leaving a paper bag full of drugs in a gutter amounts to a loss of a subjective expectation of privacy).

171. *Kyllo*, 533 U.S. at 31.

172. U.S. CONST. amend. IV.

effects" term in the Fourth Amendment.[173] However, the Supreme Court's new standard would establish that general use of this technology would preclude any constitutionally protected privacy right. As these examples demonstrate, the cumulative effect of the introduction of home and personal effects-based applications of technology would produce a spiral of ever increasing general use. This, in turn, would produce an ever-shrinking zone of personal privacy protection, a situation that the majority could hardly have intended. This shrinking zone of privacy is also reflected in the next major shortcoming of the Supreme Court's test, the reversion of privacy protection to a property-based rationale.

B. Reversion to Property-Based Standards

In *Kyllo*, the majority refused to apply the traditional *Katz* test, instead resurrecting old Constitutional theories under a new name. The *Kyllo* test refocuses the Court's Fourth Amendment jurisprudence on the common law protections of the "prototypical and hence most commonly litigated are of protected privacy,"[174] the interior of the home. This criteria ensures "preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted,"[175] a not-so-subtle nod to the jurisprudential bias of Justice Scalia. However, the Supreme Court's new test leaves unanswered the question of how cases like *Olmstead* and *Katz* would be decided under this "details of the home that would previously have been unknowable without physical intrusion" standard.[176] Although Justice Scalia's critique of the *Katz*-standard as being circular in nature was on target, these early decisions at least made reference to a zone of privacy that extended beyond a person's property. The language of physical intrusion suggests that trespassory concepts are again the critical underpinning of Fourth Amendment protection. These concepts seem least equipped to handle potential controversies of investigatory action in areas where the highest technology thresholds exist.

For example, the Supreme Court's new test provides no viable standard for evaluating technology like the Federal Bureau of Investigation's Carnivore program.[177] Carnivore is designed to sweep through a large volume of e-mail without being detected, looking for key words and phrases that match a profile.[178] Since it performs this sweep by merely intercepting transmitted message data, it falls short of the "physical intrusion" of personal property. In addition, most, if not all, of the intrinsic

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173. *Id.*

174. *Kyllo*, 533 U.S. at 28.

175. *Id.*

176. *Id.* at 40.

177. *See* Eichenlaub, *supra* note 27 (discussing the Carnivore program).

178. *See* Jerry Seper, *FBI Follies Continue*, WASH. TIMES, June 9, 2002, *available at* 2002 WL 2912066; Catherine M. Barrett, *FBI Internet Surveillance: The Need for a Natural Rights Application of the Fourth Amendment to Insure Internet Privacy*, 8 RICH. J.L. & TECH. 16 (2002).

information in this electronic message traffic reveals information not about the intimate details of a person's home, but information personal and particular to an individual. This is exactly the same information rejected as a basis for specific constitutional protection by Justice Scalia,[179] and, as a result, the individual can expect no protection from any Carnivore-derived technology due to the ruling in *Kyllo.*

C. The Precision Offered to Police

One other substantial concern can be identified from the new "bright-line" standard offered by the majority in the *Kyllo* decision. As one of its critical goals, the majority seeks to develop a standard that will provide clear guidance to law enforcement personnel.[180] The dissent notes a shortcoming of this standard in its failure to account for new technologies clearly outside the "general public use" standard but still oriented toward receiving or analyzing details in which the subject is clearly no longer manifesting any expectation of privacy.[181] The extension of this analysis includes criticism of the "details of the home" standard as being overbroad in its restraint of the powers of law enforcement investigation, which the dissent notes in its pizza delivery example.[182]

While the dissent does point out some interesting potential applications that clearly appear jeopardized by the decision in *Kyllo,* the greatest impact missed by even the dissent is on already existing law enforcement technology successfully employed in numerous previous investigations. For example, the Court notes that in *Smith v. Maryland,*[183] application of the *Katz* test led the Court to conclude that use of a pen register by police at the phone company to determine numbers dialed from a private home was not a search.[184] Under the new *Kyllo* rationale, however, the pen register would most likely be found to be 1) "a device that is not in general public use" and 2) a device that would reveal "details of the home that would previously have been unknowable without a physical intrusion" (arguably, the phone numbers a person dials fall into this area).[185]

As the majority opinion acknowledges, the difficulty lies in providing a standard that enables an officer to know before the surveillance begins whether she is encroaching on personal privacy to an extent pro-

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179. *Kyllo*, 533 U.S. at 37.

180. *Id.* at 39 ("The people in their houses, as well as the police, deserve more precision.").

181. *Id.* at 47-48 (decrying the inability to account for mechanical substitutes for dogs, or more pragmatically, devices that could detect deadly bacteria or chemicals).

182. *Id.* at 48 ("Under that expansive view, . . . an officer using an infrared camera to observe a man silently entering the side door of a house at night carrying a pizza . . . would be guilty of conducting an unconstitutional 'search' of the home.").

183. 442 U.S. 735 (1979).

184. *Kyllo*, 533 U.S. at 33 (citing *Smith*, 442 U.S. 735).

185. *Id.* at 40.

tected by the Fourth Amendment.[186] However, by completely eliminating any reference to objective expectations of privacy and replacing them with the "details of the home" standard, the Court actually invites a regressive view of surveillance into its jurisprudence. What was a simpler analysis for law enforcement personnel to conduct (the degree to which the person is demonstrating an expectation of privacy distinct from public access) is now much more problematic for the officer (what details, no matter how accessible to the general public, are within the "details of the home?"). Instead of allowing an officer to use her experience and common sense in assessing what a reasonable person would consider a private area, the Court now asks that officer to decide what a court would consider "details of the home," a subject as yet undefined in any jurisprudence.[187] By failing to define these essential terms of the *Kyllo* test, the Court leaves both law enforcement officers and the courts without guidance as to how to evaluate the subjective determinations of officers on the street, a situation that will inevitably result in extensive Constitutional appeals.

CONCLUSION

In *Kyllo v. United States*, the Supreme Court clearly articulated some of the faults of the existing legal standards for assessing an individual's right to privacy as protected by the Fourth Amendment. However, despite the meritorious attempt to define a bright line standard that would address the application of new investigatory technology, the rationale expressed in *Kyllo* actually represents a step back for privacy protection. By failing to provide an objective standard—such as society's willingness to accept a manifestation of privacy as reasonable—*Kyllo* fails to provide a static target for dispassionate judicial review of law enforcement activities. In addition, the re-introduction of trespassory concepts as the basis for privacy rights represents a severe limitation on the application of *Kyllo* to preemptively address new law enforcement technology.

*Reginald Short**

186. *Id.* at 39 (discussing why the Court could not establish a standard based upon the principle of "intimate details").

187. *See* Thueson, *supra* note 92, at 197.

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BOOK REVIEW

FREE SPEECH AND PRIVATE ENTERPRISE

CENSORSHIP INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES. By Lawrence Soley. New York: Monthly Review Press. 2002. Pp. xi, 260. $23.95 (paperback).

Reviewed by Robert E. Riley, Jr.[*]

Americans typically believe that government represents the greatest threat to free speech. They can point to certain laws and precedent setting cases as examples of government's attempts to control freedom of expression. However, how many Americans would expand the discussion to examine the ways that private enterprise attempts to control free speech? Professor Lawrence Soley[1] does exactly that in his book *Censorship Inc.: The Corporate Threat to Free Speech in the United States.*[2]

Soley thoroughly documents and critically analyzes the efforts of private parties to stifle. His thesis is that American corporate growth combined with the judicial system's willingness to recognize artificial entities as possessing the same rights guaranteed to individuals creates an expanding environment where private property rights are trumping free speech rights.[3] Although Soley makes a convincing case to support his argument, he sometimes lets his general suspicion of corporations and conservative politics color his analysis with the almost cliché leftist doctrine that big business is the enemy.

Soley's purpose in writing this book was "to stimulate a debate about what constitutes censorship in the 'land of the free.'"[4] Accordingly, this review will examine Soley's arguments and challenge some of his assertions. Part I will discuss the historical incidents of private organizations limiting citizens' free speech. Part II will look at more modern attempts to silence speech through the use of strategic lawsuits against public participation known as "SLAPPs." The elevation of pri-

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2. *See* LAWRENCE SOLEY, CENSORSHIP INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES (2002).

3. *See id.* at 16-20.

4. *Id.* at xi.

vate property rights over constitutionally guaranteed rights as evidenced by covenants, conditions, and restrictions ("CC&Rs") and publicly financed shopping malls will also be covered. Part III will analyze private organizational attempts to censor news content through advertiser and conglomerate pressures on the media.

I. A TRADITION OF AMERICAN PRIVATE CENSORSHIP

Soley meticulously reviews employers' tactics to limit employee speech.[5] Using perhaps the ultimate employee speech-limiting situation, the company-owned town, Soley explores the lengths to which employers were willing to go to limit criticism. This discussion demonstrates that whatever private censorship we are currently experiencing, it is not new. Rather, it is simply a more modern version of a very old struggle.

The analysis begins with the pervasiveness of "company-owned towns." Approximately 2,500 company-owned towns were built between 1830 and 1930, encompassing everything from New England mill towns to Western mining towns.[6] By owning employee housing, town roads, local stores, and often times employing private police forces, companies exercised social control.[7] For employers, stifling the free speech of unhappy workers was a primary goal.

Because such towns were frequently located in remote areas, few alternatives existed for the employees when the company controlled the local movie theater, library, or other information outlets.[8] If an employee spoke out against the company or took issue with a company favored position, the employee could be fired from work, blacklisted to prevent reemployment, and evicted from company-owned housing.[9] With organized labor just beginning to have an American presence, there was precious little redress for wronged employees.

Soley argues that New Deal laws such as the Wagner Act and court decisions such as *Marsh v. Alabama*[10] helped eliminate the ability of companies to coerce free speech by providing for greater union organizing activities and retention of free speech rights on private property.[11] However, the company-owned, which directly exploited citizens and suppressed their speech, evolved into "company-dominated towns" utilizing indirect, paternalistic pressure.[12] Company-dominated towns in

5. *See id.* at 23.
6. *Id.* at 26.
7. *Id.* at 27.
8. *Id.* at 25.
9. *Id.* at 31.
10. 326 U.S. 501 (1946).
11. *See* SOLEY, *supra* note 2, at 26.
12. *Id.*

which employees are pressured to curtail public discourse still exist today. Citing areas as seemingly different as North Freeport, Maine, the home of L.L. Bean, and Newton, Iowa, home to Maytag, Soley makes a credible case that these towns' financial interests are so entwined with the local company that citizens feel compelled to subjugate their speech to their economic welfare.[13] As an example, in 1996 L.L. Bean requested and received a tax agreement that provided for millions of dollars in tax rebates.[14] Residents became concerned that L.L. Bean was placing the bottom line over community responsibility.[15] Although numerous citizens disliked the tax plan, they were "reluctant to harshly criticize Bean. They d[idn]'t want to be ostracized by their neighbors, lose their jobs with the company or get cut off from business contacts."[16] Soley notes that "[w]hen public relations campaigns, lobbying, and threats to lay off employees fail to achieve the company's policy objectives, SLAPP suits, media pressure, and other techniques are used to limit the expression of opposition viewpoints."[17]

If one company-town's citizens self-censor their speech, is this really suppression of First Amendment rights? A more logical conclusion is that with modern society offering mobility and many alternative information sources, people are deciding that economic security is more important than the right to criticize.[18] Such choices occur on a regular basis. For instance, after the September 11th attacks, some polls showed First Amendment support deteriorating in deference to increasing national security.[19] Perhaps people are consciously weighing their free speech in light of their present social and economic conditions.

Soley is not afraid to examine the speech stifling efforts of his own profession, academia. Drawing a chilling analogy between the traditional company-owned town and the politically correct world of academia, Soley observes:

> Today, private colleges and universities most closely resemble traditional company towns, providing housing for students and sometimes faculty, operating restaurants and stores, having their own police forces, and creating rules of behavior that students and faculty are ex-

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13. *Id.* at 27-28.

14. Scott Thomsen, *Realities of the '90s Strain Bean, Freeport Relationship, Some Residents Fear Retail Giant Now Cares More About Tax Breaks and Profits Than People*, PORTLAND PRESS HERALD, Feb. 24, 1996, at 1A, *available at* http://www.MaineToday.com.

15. *See id.*

16. *Id.*

17. SOLEY, *supra* note 2, at 27-28.

18. *See* William Glaberson, *Claiming a Right Not to Know; Town Smarts as a Paper Bites the Hand That Feeds It*, N.Y. TIMES, Sept. 22, 1997, at B2.

19. *See* Amber McDowell, *Poll Shows Free Speech Support Down*, SACRAMENTO BEE, Aug. 29, 2002, *available at* http://www.sacbee.com/24hour/nation/story/516894p-4102578c.html.

> pected to follow. If students or faculty fail to abide by these rules, they can be expelled or fired.[20]

Soley's observation is accurate but does not go far enough. Colleges and universities reinforce "diversity" as being a worthy goal, yet often apply the concept more to race and gender than to the truly important concept of diversity of ideas.[21] Can institutions that overwhelmingly favor politically liberal oriented professors really claim that they are creating an environment that encourages free speech?[22]

Another historical tenant of Soley's investigation is the use of "blacklists" to suppress free speech.[23] A blacklist is a list of people "who are disapproved of or are to be punished or boycotted."[24] He notes that the motion picture industry developed the Hollywood blacklist in response to the late 1940s House Un-American Activities Committee investigations.[25] Although this is perhaps the most famous blacklist, it is not an isolated incident. Private industry used blacklisting, beginning in the early nineteenth century, to protect itself from competitive pressures and to prevent unionization.[26] Soley points out these similarities that many Americans might not realize exist.

By noting the historical antecedents of New England textile working papers, without which a mechanic could not get further employment, and tracing up to the current modern day whistleblower cases, Soley presents a cohesive illustration that although times may change, the tension between parties with unequal bargaining power does not.[27] Soley is not afraid to name names either. He backs up his analysis with specific examples of blacklisting.[28] He illustrates that private organizations, rather than governmental bodies, are more likely to try and suppress critical speech using blacklists.

II. CIVIL ASSAULTS ON FREE SPEECH

Soley makes an interesting and damning assessment of how American businesses use the judicial system. He notes that although citizens use the courts to obtain relief from governmental "abridgment" of free

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20. SOLEY, *supra* note 2, at 47.

21. Nat Hentoff, *The Twilight of Free Speech at Colleges*, WASH TIMES, Oct. 14, 2002, at A23, *available at* 2002 WL2919661.

22. *See* Paul Cella, *Cella's Review: Politics, Culture, The Public Square* (Aug. 31, 2002), *at* http://cellasreview.blogspot.com/2002_08_25_cellasreview_archive.html.

23. SOLEY, *supra* note 2, at 55.

24. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 119 (10th ed. 1998), *available at* http://www.m-w.com (enter "blacklist" in search box).

25. SOLEY, *supra* note 2, at 55.

26. *See id.* at 55-56.

27. *See id.* at 55-80.

28. *See id.* at 56-67.

speech rights, corporations actually use the courts to limit the free speech of citizens.[29] Soley describes the various speech stifling tools used by corporations.

Corporations attempt to get courts to issue gag orders and seal records concerning litigation. These same corporations may require legally enforceable, signed confidentiality and non-disclosure agreements.[30] If they still cannot win, corporations may employ "SLAPP" suits against citizens.[31] Corporations through their lobbyists have even obtained passage of "product disparagement" laws designed to stifle agricultural criticism.[32]

Soley particularly focuses on the use of strategic lawsuits against public participation, "SLAPP" suits, and product disparagement laws in order to demonstrate that modern free speech stifling by private entities is alive and well. He explains that SLAPPs are civil suits without merit utilized for intimidation and designed to suppress criticism of business activities.[33] He claims that "[m]any corporations have filed frivolous, vexatious lawsuits, alleging copyright violations, patent infringement, defamation, business torts, process violations, civil rights violations, and a laundry list of other alleged injuries, not expecting to win the suits but seeking simply to silence critics."[34]

Citing University of Denver College of Law Professors George W. Pring and Penelope Canan, the originators of the term SLAPP, Soley believes that "SLAPPs transform public debates in three major ways."[35] Formerly public controversies are converted into private legal disputes.[36] The dispute then enters the private legal forum instead of remaining in the public arena.[37] Finally, by entering the legal arena, a financial burden is shifted onto the defendants.[38]

Suing for silence is not always necessary. Soley argues that sometimes the mere threat of a multi-million dollar lawsuit is enough to quiet critics. He states that many times companies bring SLAPP suits "expecting to drop them before they go to trial."[39] Corporations and other private entities compound this indignity by often requiring settlement to be contingent on signing a non-disclosure agreement that prevents the critic

29. *Id.* at 81.
30. *Id.* at 7-8.
31. *Id.* at 82.
32. *Id.*
33. *See id.* at 88.
34. *Id.*
35. *Id.* at 88-89.
36. *Id.* at 89.
37. *Id.*
38. *Id.*
39. *Id.* at 90.

from commenting on the case.[40] Soley justifiably points out that because many SLAPPs are filed against investigative media outlets, public discourse can be tremendously impacted.

Soley also provides numerous examples where SLAPPs are used by businesses against individuals or organizations. Noting that motions for summary judgment often fail in SLAPP suits, Soley explains that nineteen states have adopted anti-SLAPP laws with varying degrees of protection.[41] He does a particularly good job of sorting out the various types of protections afforded and explaining the nuances of each approach.

Soley documents the agricultural industry's attempts to stifle free speech by lobbying for passage of so called agricultural disparagement laws.[42] These laws were originally justified on the grounds that "false statements create huge losses for producers of perishable products, which decay and become worthless if not sold quickly."[43] He claims that these disparagement laws often require food critics to prove the veracity of their statements rather than requiring the plaintiffs to prove that such assertions are false.[44] This shifting of the burden of proof may then require the introduction of scientific evidence proving that the statement is accurate.[45] Such laws are often directly targeted at animal rights groups or consumer "food police" who want to alert the public to potentially troubling issues.[46] However, the extension of product disparagement laws to non-perishable industries, such as cattle raising, appears to be a slippery slope. Soley postulates that industries such as chemical, pharmaceutical, energy, and others may also want to lobby for passage of such laws to silence critics and protect their product sales.[47]

With a warning reminiscent of Eisenhower's admonishment about the military-industrial complex,[48] Soley argues that businesses, industries, and politicians are all guilty of placing profits, or campaign contributions, ahead of the public welfare and the Constitution.[49] Indeed, they are willing to risk the public's health by silencing the debate.[50] Soley

40. *Id.* at 90-91.
41. *Id.* at 95.
42. *Id.* at 115-16.
43. *Id.* at 119.
44. *Id.* at 116-17.
45. *Id.* at 118.
46. *Id.* at 116.
47. *Id.* at 120.
48. Dwight D. Eisenhower, Eisenhower's Farewell Address to the Nation (Jan. 17, 1961), *at* http://mcadams.posc.mu.edu/ike.htm.
49. SOLEY, *supra* note 2, at 129.
50. *Id.*

views a possible solution as being the public financing of campaigns to remove the influence of big business lobbyists.[51]

However, the reader is left wondering what rights should businesses be afforded where their interests are concerned? For instance, should cigarette companies be banned from advertising their products because activists believe such advertising campaigns are targeted at children?[52] Isn't this the stifling of free speech? And should corporations remain silent when activists lead product boycotts against them?[53] Glass company Corning Inc. lost a billion dollars in market capitalization in a single day after the local paper ran a story saying the company was in a "state of emergency."[54] It removed all of the newspaper's vending boxes from its property and deposited them in the newspaper's parking lot.[55] Did the newspaper have an inalienable right to sell its product on another party's property?

Soley's discussion is thorough but largely one sided. His argument that such disparagement laws are not truly designed to assist the family farmer or rancher but rather big business seems to discount the fact that such laws may directly impact the smaller rancher and farmer. Although his point may be overstated, it has merit. Undoubtedly, large commercial concerns and agricultural federations receive a tremendous benefit from these laws.

III. PROPERTY OVER SPEECH

One of Soley's major themes is that the places where free speech is protected are shrinking because corporate power is increasing and the influence of labor unions is declining.[56] Soley contends that the courts, and in particular decisions by the United States Supreme Court, have effectively constrained First Amendment free speech rights at malls and shopping centers.[57] By elevating commercial property owners' rights above individual's free speech rights, Soley demonstrates that the logical consequence is the current increase in common interest developments, or homeowner association governed communities, which limit constitutionally protected rights through the use of covenants, conditions, and restrictions known as "CC&Rs."[58]

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51. *See id.* at 133.

52. *See* Richard T. Kaplar, *An Irresponsible Approach to Free Speech*, *at* http://median-institute.org/digest/97winter/editors/1.html (last visited Nov. 4, 2002).

53. See Kenneth MacKendrick, The Boycott Page, *All Things New*, *at* http://www.scm-canada.org/atn/atn94/atn941_p5.html (last visited Nov. 4, 2002).

54. Glaberson, *supra* note 18.

55. *Id.*

56. SOLEY, *supra* note 2, at 135.

57. *Id.* at 136.

58. *See id.* at 173.

If there is one element of this book that Soley seems truly passionate about, it is that private shopping malls have encroached on the public sphere of free speech. He sets his argument's context with facts and figures concerning the growth of shopping malls.[59] In modern America, there is certainly no disputing that shopping malls are an important and pervasive component of our society.

What seems to really upset Soley is that shopping malls are frequently subsidized, directly or indirectly, by public tax dollars and represent themselves as being modern town squares. They often contain government functions such as police substations and post offices, and yet still feel they are "private property, where free speech may be curtailed."[60] He dutifully recites the line of federal court cases that support the stifling of political and labor protest and lays blame at the feet of conservative political ideology.[61]

However, it's not only the federal system that allows this contraction of free speech rights. Soley explains that while three states interpret state constitutions to recognize free speech rights in shopping malls, thirteen state supreme courts have in fact rejected "state constitutional protections for free speech in shopping malls."[62] Perhaps just as worrying to Soley is that there is a trend for governments to abdicate accountability for traditional government services by privatizing them.[63] The concern is that if speech is protected from government intrusion but not private party intrusion, then merely replacing government oversight with private management creates a situation where free speech protection may be diminished. Schools are an example of this, and Soley states that such "privatization of the public sphere has substantially reduced the space available for public speech."[64]

The conflict between governmental functions, such as protecting citizens' free speech rights and the capitalistic goal of making money, are increasingly common. Martin Wolf, Chief Economics Commentator for the United Kingdom's *Financial Times*, "warned that corporations may be encroaching on the realm of politics."[65] He went on to caution that corporations should "focus on the basics" and "[t]heir role is to be good

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59. *Id.* at 141-42 (noting that in any given week 70% of the U.S. population shops at privately owned shopping centers and that privately owned shopping centers have increased from around 3000 in 1960 to over 40,000 today).

60. *Id.* at 144.

61. *See id.* at 151-52.

62. *Id.* at 160.

63. *Id.* at 151.

64. *Id.*

65. World Economic Forum, *Corporate Citizenship Is Not a Luxury* (Feb. 4, 2002), *at* http://www.weforum.org/site/homepublic.nsf/Content/Corporate+Citizenship+%E2%80%9CIs+Not+a+Luxury%E2%80%9D.

businesses, not to save the planet."[66] Increasingly, this leads to a situation where, because business executives are not democratically elected, a question of accountability arises.[67]

However, the privatization of the public sphere extends far beyond the commercial realm. Soley argues that the marked increase in common interest developments, where typically a homeowners association manages common areas such as parks and enforces regulations binding on its members, creates a situation where a private party is able to pass restrictions that, if passed by a municipal government, would be unconstitutional.[68] He makes a convincing argument. Private homeowners associations are able to act as pseudo-governments by passing and enforcing covenants, conditions, and restrictions limiting or prohibiting political yard signs, the flying of flags, the displaying of religious symbols, and the distribution of leaflets and campaign literature.[69] Soley concludes that what CC&Rs effectively do is "assure that people with different cultural outlooks cannot express themselves."[70]

However, Soley notes that in many instances these restrictions are one of the primary reasons that people want to live in such communities. Where he displays his bias is when he contends that Republicans, whose ideology seems completely opposed to such restrictions, populate these areas.[71] Without citing any demographic figures to support this assertion, Soley comes across as having a partisan agenda, which detracts from his largely well reasoned work.[72]

Where Soley's work seems most debatable is how commercial advertisers impact news media, thereby creating media self-censorship.[73] Although he recites numerous instances where companies have withdrawn their advertising dollars because they did not like the content of a particular news story, or where media companies have not run stories because they did not want to upset advertisers, the real question is, "What is wrong with that?" The fact of the matter is that it is a company's prerogative to spend its resources in the manner it sees most fit. Soley's analysis comes across as displaying a bit of an entitlement mentality, where newsrooms should be able to collect advertiser's money on one hand, while with the other operate with complete impunity from the laws of capitalism.

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66. *Id.*
67. *Id.*
68. SOLEY, *supra* note 2, at 172.
69. *Id.* at 174-75.
70. *Id.* at 178.
71. *Id.*
72. In the interests of full disclosure, the reviewer is a registered Republican who lives in a covenant-controlled community.
73. SOLEY, *supra* note 2, at 213.

However, he makes a much more persuasive case when he notes that deregulation has allowed corporate conglomerates to acquire newspapers and broadcast media, while having other lines of business that are often the subject of media stories.[74] This inherent conflict of interest seems to create exactly the set of circumstances required to allow coercive censorship. Soley cites a number of examples, such as General Electric's ownership of NBC, that demonstrate the free speech chilling effect that having a conglomerate for parent owner can create.[75]

CONCLUSION

Soley makes a solid case that market forces as applied through deregulation and privatization have, rather than increasing freedom of speech, in fact fostered greater censorship. His observations that the line blurring between public and private spheres has contributed to an expansion of stifled free speech are well documented. Soley's contribution to the free speech realm is intriguing because it shifts the discussion away from government suppression to the more pervasive but seemingly little noticed area of private censorship.

If his goal is to get people thinking about what free speech really represents, then he has succeeded. This book, although occasionally one sided and illustrating certain political biases, makes the reader consider the multitude of ways that private organizations help to suppress individual free speech. Soley's work is well worth the investment of a thoughtful read as the payback is a greater appreciation of how we all-too-easily acquiesce in surrendering our free speech.

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74. *See id.* at 229-30.
75. *Id.* at 230.